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N. 2898

No. 14469

United States
Court of Appeals
for the Ninth Circuit

JOHN K. BORG,

Appellant,

vs.

LOUIS A. BOAS and THE NEWS-REVIEW
PUBLISHING COMPANY, INC., a Corpora-
tion,

Appellees,

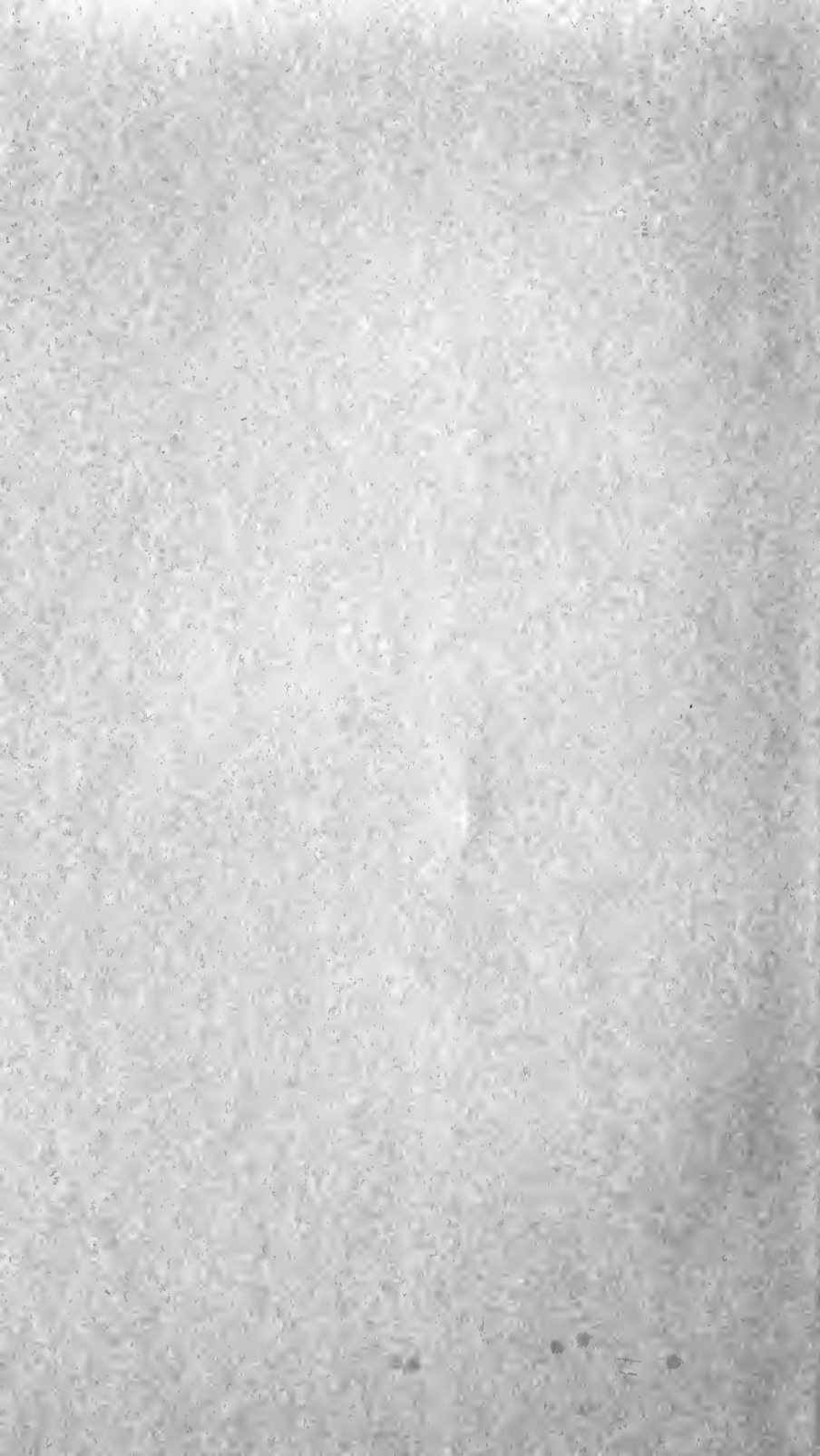
Transcript of Record
In Two Volumes
Volume I
(Pages 1 to 24)

Appeal from the United States District Court
for the District of Idaho,
Central Division.

FILED

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif. — 12, 10-54/1

PAUL P. O'BRIEN,
CLERK



No. 14469

**United States
Court of Appeals**
for the Ninth Circuit

JOHN K. BORG,

Appellant,

vs.

LOUIS A. BOAS and THE NEWS-REVIEW
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original **certified record** are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the District
of Idaho, Central Division

No. 1950

JOHN K. BORG,

Plaintiff,

vs.

T. C. THOMAS, LOUIS A. BOAS, and THE
NEWS-REVIEW PUBLISHING COMPANY,
INC.,

Defendants.

COMPLAINT

Plaintiff complains and alleges:

I.

That at all times referred to herein, the defendant News-Review Publishing Company, Inc., was and is an Idaho corporation, existing under and by virtue of the laws of the State of Idaho, with its principal place of business in Moscow, Idaho. Said corporation is the owner and publisher of a daily newspaper, known and titled as "The Daily Idahonian," and Louis A. Boas is the editor thereof, which paper has a large circulation in the states of Idaho and Washington.

The defendant T. C. Thomas is a resident within the County of Latah, State of Idaho.

II.

The plaintiff, John K. Borg, has for many years heretofore been a resident of Moscow, Idaho. Said

plaintiff is now, and has been since September, 1953, a resident of Pullman, Washington, and is employed as a clerk in the Washington Hotel, in Pullman, Washington. That from January, 1953, to September, 1953, and for many years prior to January, 1953, the plaintiff had been and was a Justice of the Peace, in and for Latah County, State of Idaho, and did, prior to the acts herein complained of, enjoy an excellent reputation for truth, veracity and integrity, and has been a respected citizen.

III.

The jurisdiction of this Court is founded on diversity of citizenship. The amount in controversy, exclusive of interest and costs, exceeds the amount of \$3,000.00.

IV.

That the defendant Thomas, on or before the 12th day of May, 1953, became the author of a written article concerning this plaintiff, which article, or quotations therefrom, was printed in the Daily Idahoian on May 13, 1953, with the consent, knowledge and authorization of the defendant Thomas, and circulated throughout the states of Idaho and Washington. That such article and publication was false and untrue, but was written, published and circulated with the intent to, and did, directly, indirectly and by innuendo, accuse the plaintiff of dishonesty, trickery, corruptness and of malfeasance and misfeasance of public office; and with the purpose of destroying plaintiff's reputation, exposing him to

public hatred, contempt, ridicule and obloquy, and to deprive him of public confidence.

V.

That said article was false and untrue, particularly in the following respects:

“Thomas then made reference to legal maneuvers in which a hearing was set for January 15 at 9 a.m. At 8 a.m. that day, Thomas explained, Alsager notified Judge John K. Borg that he would be ready at 9. Alsager and his witnesses were present at police court, normally the place where such hearings are held. But the judge and Estes, Thomas said, had gone to the county courthouse to hear the case.

“ ‘This was a ridiculous situation,’ said Captain Thomas. A motion for dismissal was made and it was dismissed. ‘If this had been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witnesses and come on over.’

* * *

“But these things, Thomas said, ‘continue to disturb me’:

* * *

“ ‘3. The extraordinary circumstances in which the first felony was dismissed.

“ ‘4. Circumstances of the dismissal of the second charge against Estes.

* * *

“ ‘There is no way to get justice or to correct the faults in the administration of justice * * * without a grand jury,’ Thomas concluded.”

VI.

That by reason of the aforesaid article, and remarks of the defendant Thomas, and the publication and distribution of the *Daily Idahonian* of May 13 throughout Latah and Whitman Counties in Idaho and Washington, and in miscellaneous other states, plaintiff has been deprived of public confidence, has suffered embarrassment, humiliation and mental agony, has been held in contempt, calumny, ridicule, and such publication has caused plaintiff's friends and acquaintances of years standing to avoid the plaintiff, all to his damage in the sum of \$75,000.00.

Wherefore, plaintiff prays for judgment against the defendants, T. C. Thomas, Louis A. Boas and The News-Review Publishing Company, jointly and individually, in the sum of \$75,000.00; for his costs and disbursements herein; and for such other and further relief as to the Court shall seem meet and proper.

J. P. TONKOFF,

ESTES & FELTON,

By /s/ MURRAY ESTES,

Attorneys for Plaintiff.

Duly verified.

[Endorsed]: Filed November 10, 1953.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS LOUIS A. BOAS
AND THE NEWS-REVIEW PUBLISHING
COMPANY, INC.

Comes Now the defendants Louis A. Boas and The News-Review Publishing Company, Inc., a corporation, and for answer to plaintiff's complaint on file herein admit, deny and allege as follows:

I.

Admit the allegations contained in Paragraph I of said complaint.

II.

Answering Paragraph II of said complaint, defendants admit that the plaintiff John K. Borg has for many years been a resident of Moscow, Idaho; admit that from January, 1953, to September, 1953, plaintiff was a Justice of the Peace for Latah County, Idaho, and admit that since September, 1953, said plaintiff has been employed as a clerk in the Washington Hotel in Pullman, Washington. Defendants deny each and every of the remaining allegations in Paragraph II of said complaint.

III.

Answering Paragraph III of said complaint, defendants admit that the amount in controversy, exclusive of interest and costs, exceeds the amount of \$3,000.00. Defendants deny each and every of the remaining allegations in said Paragraph III of said complaint.

IV.

Answering Paragraph IV of said complaint, defendants deny each and every allegation therein contained.

V.

Answering Paragraph V of said complaint, defendants admit that the quoted matter set forth therein was published in the issue of the Daily Idahoian printed and published by the defendant The News-Review Publishing Company, Inc., on May 13, 1953, and in this connection defendants allege that the quoted portions of said Paragraph V are only extracts from the printed article, the whole of which is set forth and attached hereto as Exhibit "A" and by reference made a part hereof and that said quoted extracts thereof set forth in Paragraph V must be read in connection with and as they appear in the whole of said article in order to ascertain their true purpose, meaning and intent.

VI.

Answering Paragraph VI of said complaint, defendants deny each and every allegation contained therein.

VII.

Defendants deny each and every allegation in said complaint not expressly admitted to be true.

First Affirmative Defense

Further answering said complaint and as a first affirmative defense thereto, these answering defendants allege:

I.

That the Court lacks jurisdiction of the subject matter of the action or the parties thereto.

Second Affirmative Defense

Further answering said complaint and as a second affirmative defense thereto, these answering defendants allege:

I.

That the complaint fails to state a cause of action against these defendants upon which relief can be granted.

Third Affirmative Defense

Further answering said complaint and as a third affirmative defense thereto, these defendants allege as follows:

I.

That each and every of the statements quoted in Paragraph V of plaintiff's complaint are true and correct.

Fourth Affirmative Defense

Further answering said complaint and as a fourth affirmative defense thereto, these defendants allege as follows:

I.

That at all times referred to in plaintiff's Complaint, the defendant, T. C. Thomas, was a Captain in the United States Navy, assigned to duty at the University of Idaho in Moscow, Idaho, as a professor of Naval Science, and as Commanding Officer of

the Naval Reserve Officers' Training Corps Unit at Moscow, Idaho. That the Naval Reserve Officers' Training Corps is a national program for the education and training of citizens to qualify them to serve as officers in the United States Navy and Marine Corps. That during the above-mentioned period, one Richard Shoup, was duly and regularly enrolled as a member of the Moscow Unit of the Naval Reserve Officers' Training Corps, and under the command and jurisdiction of the said defendant, T. C. Thomas, who was responsible for his educational progress and training.

That on or about December 14, 1952, the above-mentioned Richard Shoup became involved in an altercation and combat with one Murray Estes, in Moscow, Idaho, which resulted in:

1. Estes being charged in the Probate Court of Latah County, Idaho, with the crime of: "Assault with a Deadly Weapon—a Felony."

2. Estes being dismissed from the charge filed in the Probate Court and transferred to the Justice Court of the Second Justice Precinct of Latah County, State of Idaho, by John K. Borg, Justice of the said Court, who is the plaintiff in this action.

3. Estes being charged in the Justice Court of the Second Justice Precinct of Latah County, State of Idaho, before Kent Power, Justice of the Peace, with the offense of: "Assault with a Deadly Weapon."

4. Estes being dismissed from the charge in the Justice Court of the Second Precinct before Kent Power, Justice of the Peace, by Justice of the Peace, John K. Borg, who is the plaintiff in this action, before whom said case was transferred.

5. Estes being charged in the Justice Court of the Second Justice Precinct of Latah County, State of Idaho, before Kent Power, Justice of the Peace, with the offense of: "Battery."

6. Estes pleading guilty in the Probate Court of Latah County, Idaho, to the charge of Battery, which proceeding was initiated in the Justice Court of the Second Justice Precinct of Latah County, State of Idaho, and being adjudged by said Probate Court to pay a fine of \$100.00 and costs of the prosecution in the sum of \$3.00.

7. Shoup being charged in the Justice Court of the Second Justice Precinct of Latah County, State of Idaho, before Kent Power, Justice of the Peace, with the crime of: "Attempt to Compound a Crime—a Felony."

8. Shoup being dismissed from the charge set forth in the preceding subdivision by Kent Power, Justice of the Peace.

9. That the proceedings had and disposition of the above-mentioned official public judicial proceedings caused a large number of citizens of Latah County, Idaho, to petition the authorities of said county, and particularly the judge of the second judicial district of the State of Idaho in and for the

County of Latah, to convene a Grand Jury for an investigation of said proceedings and the public officials participating in the same, and, in addition thereto, a great number of the citizens and residents of Latah County held a public meeting in the High School at Moscow, Idaho, on the evening of May 12, 1953, attended by said district judge, where said proceedings and the calling of a Grand Jury to investigate the same and the public officials connected therewith became a matter of public discussion.

That the quotations set forth in paragraph V of plaintiff's complaint are only parts of an article printed and published in the Daily Idahonian on May 13, 1953, the whole of which is hereunto attached as Exhibit "A."

That said article was a full and fair report of a public meeting of citizens held in the Moscow High School in Moscow, Idaho, on May 12, 1953, for the purpose of discussing the subjects and proceedings of public, official, judicial proceedings theretofore instituted and pending in the Courts of Latah County, State of Idaho.

That the language quoted in paragraph V of plaintiff's complaint was spoken at said meeting by the defendant, Thomas, and was an expression of his own opinion upon public, official, judicial proceedings, and was made for the purpose of acquainting the citizens and taxpayers of Latah County with matters, which he believed to be and which were of public interest and for the good and welfare

of the citizens of said County and were made without malice or ill feeling toward the plaintiff and that nothing was said by him for the purpose of injuring the plaintiff in any manner whatsoever.

That the article attached hereto as Exhibit "A" constitutes a true and fair report of the public meeting hereinabove referred to and each and all of the words and statements therein contained, in their natural and ordinary meaning, are true in substance and in fact, and in so far as the words consist of expressions of opinion, they are fair and impartial comments upon the public, official, judicial proceedings referred to, made in good faith and without malice and upon the said facts, which are a matter of public interest and concern, and were spoken and published for the public benefit and are, therefore, privileged.

That in publishing the matters appearing in Exhibit "A," these defendants believed that the matters and things therein were true and of such general interest to the public to justify its publication and make it incumbent upon them to publish the same.

That in publishing said Exhibit "A," these defendants acted with full right to do so for the benefit of the entire community of Moscow, Idaho, and the public in general and under privilege.

That in alleging in this affirmative defense that the statements of fact contained in said Exhibit "A" are true, these defendants have reference to every statement of fact in the aforesaid Exhibit "A" and

relating to plaintiff and the conduct of the plaintiff with respect to the matters therein referred to.

Wherefore, these answering defendants pray that plaintiff's action be dismissed, that he take nothing thereby, and that these defendants have and recover their costs and disbursements necessarily expended therein, and that these defendants be granted such other and further general relief as to the Court may seem warranted upon a hearing.

/s/ MAURICE H. GREENE,
Attorney for Defendants Louis A. Boas and The
News-Review Publishing Company, Inc.

Duly verified.

Good Government Association Formed Public Meeting Called At School

tion of the Moscow population, numbering some 175, not satisfied with recent actions which brought apt conclusion of the legal cases involving a Moscow y and a University of Idaho student, went on record blic gathering last night "requesting a grand jury" clear away what the group called a "miscarriage of

gathering at Moscow high school last night was called est to the actions growing out of incidents at the a campus restaurant, last December 14, involving d Shoup, university student, and Murray Estes, local

morning, District Judge e, upon whose order rests of a grand jury, said he recommend to Latah county Attorney Melvin Al that a "full and complete" be conducted in the point p cases even to the point g a qualified investigator." e said he would recom- approval to the county coners the use of the prosecu- agency fund for financing a investigation.

ing such an investigation, eta warrant the filing of ions in the cases," Judge e said he would then con- a future course of action, t be through the local level or through call of a jury."

McQuade, in attendance at a session and frequently open to answer questions the so-called "free forum," d his earlier remarks that not call a grand jury if the e call is on rumor alone, e I won't see innocent peo-

Lengthy Review
night's session opened (ol- selection of Dean D. S. of the university Forestry as temporary chairman) detailed review of the Estes- cases by Capt. Thomas C. commander of the univer- sity ROTC unit, of which was a member.

McQuade presented his relation of the incidents began at a party at the Ida- ho club, at which Estes was e, and continued through the altercation at the Perch subsequent legal maneuvers e. Last week with e to a battery charge e and criminal charges e against Shoup charging e to commond a felony.

"To my knowledge," Judge McQuade said, "Captain Thomas reported certain facts and incidents which have never before been told publicly and were not a part of any court record . . . they, if they are true, could change matters considerably."

Only One Side

When asked by Mrs. Helen Howard "if Captain Thomas' facts are true, would you accept that as sufficient evidence for the calling of a grand jury?" Judge McQuade answered: "If they are all true and there are no explanatory facts which neutralize them, it would be proper to bring in a grand jury. But the captain has brought in only one side of this case."

McQuade, after complimenting Captain Thomas for his detailed review and his presentation, declared the navy man had put forth only facts which were favorable to his side.

Last night's meeting came about as a result of an earlier refusal by Judge McQuade to call a grand jury to investigate possible evidences of injustices during the four-month course of the Estes-Shoup cases.

During the course of the three-hour session last night, motions from the floor resulted in the following actions:

Four Steps

1. Formation of an organization to be known as the provisional Latah County Good Government association.

2. Authorization of the temporary chairman to appoint a committee to poll Latah county residents on the question of whether they want a grand jury impaneled.

3. Selection of a committee, made up of Jeffers, Malcolm Neely, Carman Mell, Moscow; William McCreery, Kendrick, and J. O. Broyles, Potlatch, to put forward a slate of officers, draw up an organizational plan and arrange for future meetings.

4. Requested the temporary chairman to inform Judge McQuade that it was the desire of the group that a grand jury be called.

It was upon the issuance of the statement by Chairman Jeffers to McQuade revealing the desire of the group that Judge McQuade repeated his stand that he would "not call a grand jury on rumor alone."

Both sides of the issue were presented at the session. The Rev. W. W. Prall, speaking as a "private citizen," urged more investigation. "Let's find out first, what a grand jury can do. To be perfectly frank, all I have heard is rumor and I doubt if you can investigate a rumor."

He also explained that he "did not believe that at the moment there is anything on which the judge could impanel a grand jury."

Needs Evidence

To which Judge McQuade replied: "All the petitions in the world won't find a man guilty. The only thing that means anything is evidence. I'm not going to call the grand jury. I'm not going to take a chance of having people hurt."

In his detailed review of the cases, Captain Thomas said that shortly after the party at the Idaho Ad club at which both Estes and J. M. O'Donnell, then county prosecuting attorney, were present, Estes went to the Perch and accosted Shoup. The proprietor of the cafe intervened and police were summoned.

The first police officer who arrived, Captain Thomas said, allowed Estes to depart "and did not take his pistol from him." The second officer, he said, arrived and took Shoup to jail, where he



questioned "for quite a considerable time."

was then thoroughly established," Thomas said, "that he was completely innocent, and later admitted that it had been a case of mistaken identity."

For several instances where charges against Estes had been dissuaded from any charges against Estes, a charge was filed soon after Mel-alsager took office as prosecuting attorney, some four weeks after the incident, Thomas said.

Estes then made reference to maneuvers in which a hearing was set for January 15 at 9 A. M. that day, Thomas said, Alsager notified Judge K. Borg that he would be at 9. Alsager and his witnesses were present at police court, the place where such cases are held. But the judge, Estes, Thomas said, had gone to the county courthouse to hear case.

Ridiculous Situation
This was a ridiculous situation," Captain Thomas. A motion dismissal was made and it was denied. "If this had been an mistake, it could have been rectified by lifting a telephone and telling the prosecutor his witnesses and come over."

A second felony charge was filed five days later but this also was denied, Captain Thomas said, he ground that there was insufficient evidence upon which to file Estes over.

At the meantime, Captain Thomas explained, the boy (Shoup) was going a strain which was evidenced in bad grades and a possibility he would be expelled from naval ROTC.

At the end of January," Thomas continued, "the individual who had the trouble was scott free and the victim was subject to loss of his losing his chance to be a naval officer. It was not right."

After Shoup's parents came from McKeesport, Pa., and it was then that a simple battery charge would be brought against him. This third charge was filed after Easter, Thomas added, and then Thomas then charged

Probate Judge Lloyd Martin attempted to hold a "quiet, trial" Alsager was told to be in the boy and no other witnesses, Thomas said. The prosecutor first agreed and "then when called what was happening, properly refused to go along with it."

On that day a charge was filed against Shoup alleging that he had attempted to compound a felony. Thomas said that this charge could have stood up in court.

Cites Statement

On April 23, Captain Thomas said McQuade held a conference in which he dissuaded Thomas from allowing his secretary to take notes. He went on that the following day an article appeared in the Daily Idahoian which quoted Judge McQuade as saying that an agreement had been reached by all principals in the case and that there was no justification for calling a grand jury.

Thomas said the story quoted McQuade as saying that attorneys for both sides objected to the expense of a grand jury except as a last resort. Thomas said that was erroneous, that no such agreement was reached.

On May 5, Thomas continued, there was another effort to hold a quiet trial, but that Alsager again refused, saying a public trial had been set for May 6 and that was when he intended to have it.

Estes appeared privately before the judge, pleading guilty to the charge of battery and was fined \$100. After Estes' conviction, the charge against Shoup was dismissed.

"At long last," Captain Thomas said, "we had Shoup freed."

But these things, Thomas said, "continue to disturb me."

"1. Failure of the police to arrest Estes.

"2. Failure of the police to take the pistol from Estes.

"3. The extraordinary circumstances in which the first felony was dismissed.

"4. Circumstances of the dismissal of the second charge against Estes.

"5. The reasons for the steps which McQuade took to avoid calling a grand jury."

"What to do about it? There has been no change in the local set up since December. The same faces hold office. The same thing could take place and again we'd go through this same rigamarole. There is no way to get justice or to correct the faults in the administration of justice . . . without a grand jury," Thomas concluded.

It was then that Judge McQuade took the floor to offer rebuttal to the statements made by Captain

Thomas and to present his reasons for refusing to call a grand jury.

Others Speak

Following Judge McQuade's dissertation, Chairman Jeffers declared a "free forum" and limited each speaker to three minutes.

Mrs. Bernice Brigham, Genesee, declared "this is not the only case of miscarriage of justice here" and added "it is only an indication of the type of justice Latah county has had for a long time."

Dr. R. E. Hosack, another faculty member, said he had been "disturbed by a feeling of uncertainty on the part of Moscow residents over the way local justice has been handled."

"I am also disturbed when a judge throws cold water in the face of the ancient and honorable institution of the grand jury. I think a grand jury would clear the air."

Clifford I. Dobler, law instructor, said "I don't teach about grand juries, but last week I got hold of a book called the Idaho code. I found that 16 grand jurors get \$4 a day for every day they meet plus 15 cents a mile traveling money." Thus, he said, a grand jury "would not be so expensive as Judge McQuade had intimated." And, he added, "the only people who could be injured are the guilty parties."

McQuade corrected Dobler by stating that grand jurors now get \$6 daily plus 25 cents mileage, which would amount to about \$96 daily while in session, in addition to costs necessary to subpoena witnesses.

Cites Example

McQuade made reference to a recent call to southern Idaho where he had tried grand jury indictments. In Bingham county, he said, seven men were indicted and not one convicted. But, he said, that in order to meet their legal expenses, they had all mortgaged their homes, sold their furnishings and cars, borrowed on life insurance and from friends and relatives.

"That's what I mean when I say innocent people can be hurt."

Among the other brief comments from the floor was that made by Alsager who said: "My difficulty with the Estes case has been mostly with the lower court judges. They seem to be cooperating with the defendant more than with me. I don't mean they should side with me, but they should help me get a case to the right court at the right time."

This morning Mrs. R. E. Hosack gave this statement to the Idahoian:

"As president of the Moscow Council of Church Women, I wish to make it clear that the reports in the newspaper associating the Council, in my name, with the preliminary arrangements for the public meeting held in the high school Tuesday evening to discuss the administration of justice in Latah county, were erroneous and misleading. The Moscow Council of Church Women was in no way associated with the arrangements for this or any other meeting for this purpose. Any connection which I have had with this matter has been purely in the capacity of a private citizen."

[Title of District Court and Cause.]

VERDICT

We, the jury in the above-entitled cause, find for the defendants, Louis A. Boas and The News-Review Publishing Company, Inc., and against the plaintiff.

/s/ WAYNE A. JOHNSON,
Foreman.

[Endorsed]: Filed April 8, 1954.

In the United States District Court for the District
of Idaho, Central Division
No. 1950

JOHN K. BORG,

Plaintiff,

vs.

LOUIS A. BOAS and THE NEWS-REVIEW
PUBLISHING COMPANY, INC.,

Defendants.

JUDGMENT

This cause came on for trial before the Court and jury on April 5, 1954, et seq., both parties appearing by counsel, and the issues having been duly tried, and the Court having directed the jury to render a verdict for defendants.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is Ordered and Adjudged that the plaintiff take nothing upon his complaint herein. and that the defendants, Louis A.

Boas and The News-Review Publishing Company, Inc., have and recover from the plaintiff their costs and disbursements incurred herein, taxed in the sum of \$104.04.

Dated this 8th day of April, 1954.

[Seal] /s/ ED M. BRYAN,
Clerk.

[Endorsed]: Filed April 8, 1954.

In the United States District Court for the District
of Idaho, Central Division
No. 1950

JOHN K. BORG,

Plaintiff,

vs.

LOUIS A. BOAS and THE NEWS-REVIEW
PUBLISHING COMPANY, INC.,

Defendants.

No. 1951

JOHN K. BORG,

Plaintiff,

vs.

THE TRIBUNE PUBLISHING COMPANY, a
Corporation,

Defendant.

NOTICE OF APPEAL

To Louis A. Boas and The News-Review Publishing Company, Inc., Defendants in Action No. 1950, and to Maurice H. Greene, Attorney for said

Defendants; and to The Tribune Publishing Company, a Corporation, Defendant in Action No. 1951, and to Clements & Clements, Attorneys for Said Defendant:

You, and each of you, will please take notice that the above-named plaintiff, John K. Borg, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from those certain judgments made and entered in the above-entitled Court, and causes, on the 8th day of April, in favor of the defendants, and against the plaintiff, in each of said actions.

Notice of appeal in the above-entitled causes is combined for the reason that said actions were consolidated for trial, and a single record of evidence was adduced, which is applicable to said actions jointly.

Dated this 7th day of May, 1954.

J. P. TONKOFF,

MURRAY ESTES,

By /s/ MURRAY ESTES,

Attorneys for Plaintiff.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Causes.]

Nos. 1950 and 1951

UNDERTAKING ON APPEAL

Whereas, the Plaintiff desires to give an undertaking on appeal to 9th Circuit Court of Appeals as provided in Rule 73 of The Federal Rules of Civil Procedure as set forth in U.S.C.A.

Now, Therefore, the undersigned Surety, the Fidelity and Deposit Company of Maryland, a surety company authorized to act as Surety on bonds and undertakings in the State of Idaho, does hereby obligate itself to the said Defendants under such statutory obligations in the sum of Five Hundred and No/100 Dollars.

Dated May 4, 1954.

[Seal]

FIDELITY AND DEPOSIT
COMPANY OF MARYLAND,

By /s/ E. W. NEWSOME,
Its Attorney-in-Fact.

[Endorsed]: Filed May 7, 1954.

[Title of District Court and Cause.]

No. 1950 and No. 1951

STATEMENT OF POINTS RELIED ON BY
PLAINTIFF FOR REVERSAL OF JUDGMENT

Comes now the plaintiff in the above-entitled causes, which were consolidated for trial, and files the following statement of points, relied upon by the plaintiff for reversal of the judgment entered in said actions by the United States District Court, for the District of Idaho, Central Division, on the 8th day of April, 1954.

I.

The Court erred in rejecting Exhibits Nos. 2, 3, 4 and 5, offered in evidence by the plaintiff.

II.

The Court erred in sustaining defendant's objections to plaintiff's offer of evidence to establish the circulation of the articles complained of, and the impression and understanding created by such articles upon the readers thereof.

III.

The Court erred in permitting into evidence Exhibit No. 23.

IV.

The Court erred in permitting into evidence Exhibit No. 12.

V.

The Court erred in directing the jury to return a

verdict in favor of the defendants and against the plaintiff, and in directing the entry of judgment in accordance with such verdict.

Dated this 8th day of May, 1954.

J. P. TONKOFF,

MURRAY ESTES,

By /s/ MURRAY ESTES,
Attorneys for Plaintiff.

[Endorsed]: Filed May 12, 1954.

[Title of District Court and Cause.]

ORDER

Good cause appearing therefor,

It is Ordered That the time within which the record on appeal may be filed and the appeal docketed in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is extended to August 5, 1954.

Dated this 14th day of June, 1954.

/s/ CHASE A. CLARK,
District Judge.

[Endorsed]: Filed June 14, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the United States District Court for the District of Idaho, do hereby certify that the foregoing papers are that portion of the original files designated by the parties and as are necessary to the appeal under Rule 75 (RCP), to wit:

1. Complaint.
2. Answer of Defendants Louis A. Boas and The News-Review Publishing Company, Inc.
3. Verdict.
4. Judgment.
5. Notice of Appeal.
6. Undertaking on Appeal.
7. Designation of Parts of Record Deemed Necessary on Appeal.
8. Statement of Points Relied on by Plaintiff for Reversal of Judgment.
9. Order extending time to file record on appeal.
10. Transcript of Testimony.
11. Exhibits Nos. 1 to 24, inclusive.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court this 31st day of July, 1954.

CLERK.

[Endorsed]: No. 14469. United States Court of Appeals for the Ninth Circuit. John K. Borg, Appellant, vs. Louis A. Boas and The News-Review Publishing Company, Inc., a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Central Division.

Filed August 4, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

Nos. 14469-14470

**United States
Court of Appeals**
for the Ninth Circuit

JOHN K. BORG,

Appellant,

vs.

LOUIS A. BOAS and THE NEWS-REVIEW PUBLISHING
COMPANY, INC., a Corporation,

Appellee,

and

JOHN K. BORG,

Appellant,

vs.

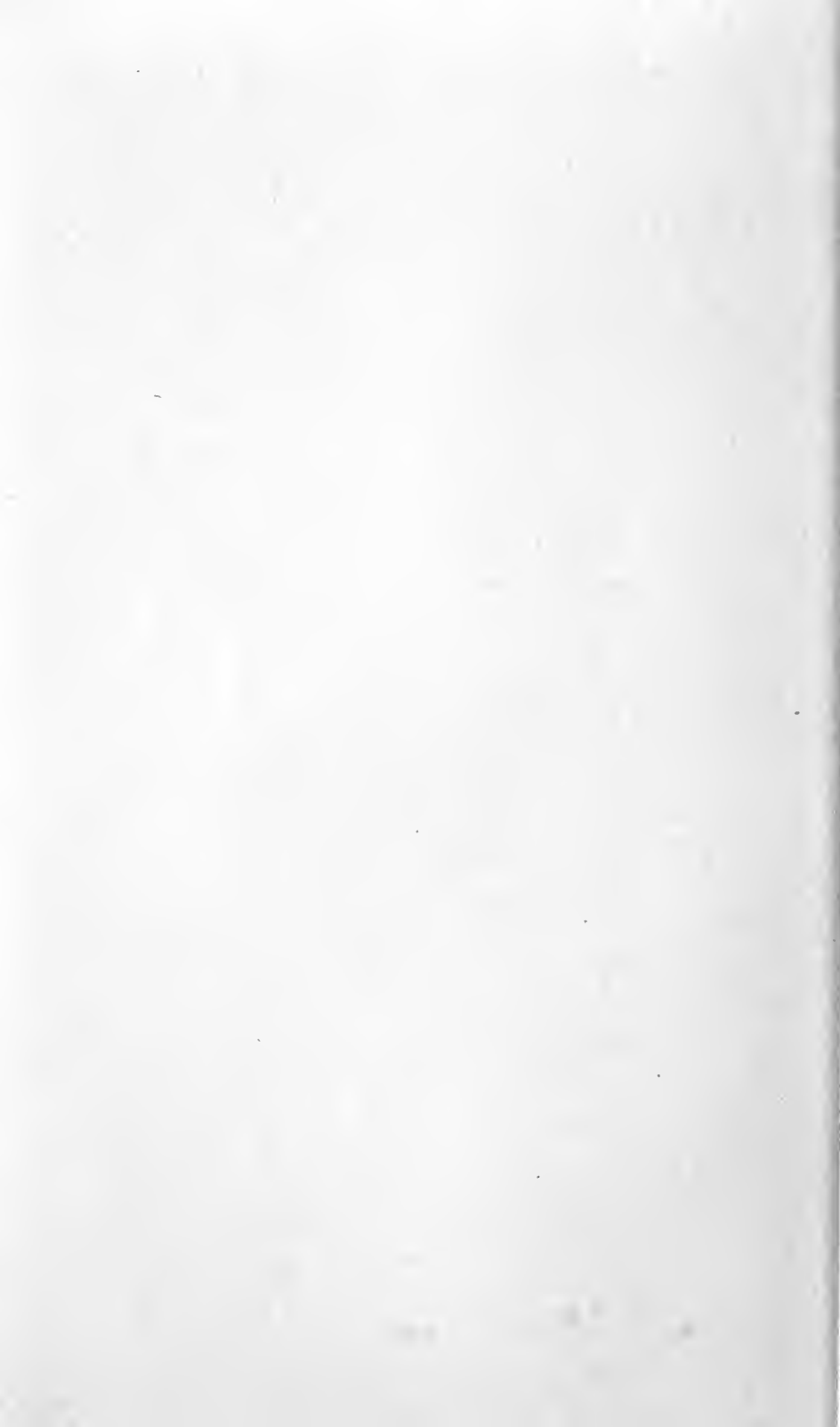
THE TRIBUNE PUBLISHING COMPANY, a Corporation,

Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 25 to 293)

**Appeal from the United States District Court
for the District of Idaho,
Central Division.**

FILED



Nos. 14469-14470

United States
Court of Appeals
for the Ninth Circuit

JOHN K. BORG,

Appellant,

vs.

LOUIS A. BOAS and THE NEWS-REVIEW PUBLISHING
COMPANY, INC., a Corporation,

Appellee,

and

JOHN K. BORG,

Appellant,

vs.

THE TRIBUNE PUBLISHING COMPANY, a Corporation,
Appellee.

Transcript of Record
In Two Volumes
Volume II
(Pages 25 to 293)

Appeal from the United States District Court
for the District of Idaho,
Central Division.



In the United States District Court for the District
of Idaho, Central Division

No. 1950

JOHN K. BORG,

Plaintiff,

vs.

T. C. THOMAS, LOUIS A. BOAS, THE NEWS-
REVIEW PUBLISHING COMPANY, INC.,

Defendants.

No. 1951

JOHN K. BORG,

Plaintiff,

vs.

T. C. THOMAS and THE TRIBUNE PUBLISH-
ING COMPANY, a Corporation,

Defendants.

TRANSCRIPT OF PROCEEDINGS

Appearances

J. P. TONKOFF, ESQ.,
Yakima, Washington;

MURRAY ESTES, ESQ.,
Moscow, Idaho;

TOM FELTON, ESQ.,
Moscow, Idaho,

Attorneys for the Plaintiff.

MAURICE GREENE, ESQ.,

Boise, Idaho;

V. R. CLEMENTS, ESQ.,

Lewiston, Idaho;

REED CLEMENTS, ESQ.,

Lewiston, Idaho,

Attorneys for the Defendants.

April 5, 1954, 10 A.M.

(Selection of jury.)

Mr. Clements: I have a motion, perhaps it should be made in the absence of the jury.

The Court: I was about to take a recess at this time for 15 minutes and I will excuse the jury and ask them to meet me in 15 minutes.

Mr. Clements: Comes now the defendant, T. C. Thomas, and respectfully shows to the Court that he is a party defendant in each of the above actions now pending in this court, both of which are at issue and set for trial upon their merits.

That the answer of the defendant filed in each of the above cases pleads as an affirmative defense that the words of the alleged libelous material set forth in each of said actions involve the same utterance to the same audience of the matter alleged in the respective actions and both actions are founded upon a single utterance or publication contrary to the provisions of Chapter 109, of the Idaho Session Laws of 1953, known to be and cited as "Uniform

Single Publication Act'' which bars plaintiff's right of recovery in one or the other of said actions. [1*]

Therefore, by reason of the premises mentioned the defendant respectfully moves that an order be made and entered herein requiring the plaintiff to elect the action upon which he will prosecute and to dismiss the defendant from the one not elected.

This motion is made and based upon the records and all of the records and files of the above-entitled action, all of which are hereby referred to and by reference made a part hereof.

Mr. Tonkoff: We feel that we should concede the motion and we elect to dismiss the defendant T. C. Thomas from action 1951 which is designated as the Tribune action and hold him in action No. 1950 in which the defendants are Thomas and the News-Review and Louis A. Boas.

The Court: Very well, the motion is granted and you elect to hold him in the so-called **Moscow case**.

Mr. Clements: I understand that when we convene Court again this afternoon that you will advise the jury that these two cases have been consolidated for the purpose of trial and that the defendant Thomas is only in the one case.

The Court: That is right. I will have [2] the bailiff advise the jury to meet us here at 2:00 o'clock this afternoon.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

April 5, 1954, 2:00 P.M.

The Court: Ladies and gentlemen of the jury, by way of explanation I will tell you at this time that there are two cases that have been filed here, one is entitled John K. Borg vs. T. C. Thomas and the Tribune Publishing Company, a corporation, the other one is John K. Borg vs. T. C. Thomas, Louis A. Boas and The News-Review, Incorporated. The Court felt that it would not be justified in having the expense of two trials as the matters involved are essentially the same, in fact, they are the same in both the publication. However, you cannot bring two suits against one person because of one publication which was published in both papers. Mr. Thomas, that is Mr. T. C. Thomas who is named as defendant is dismissed from the case of John K. Borg vs. T. C. Thomas and The Tribune Publishing Company. He is, however, still a party defendant in the other case. I don't think you will have any difficulty in this because in the final submission of the matter to you I will make it plainer, I will go into this in more detail. There are two cases filed and, as I said, I didn't feel justified in having two trials and going to that additional expense in connection with this matter, so the cases have been consolidated for the purpose of this trial. Counsel for the plaintiff may make their opening statement.

(Opening statement by Mr. Tonkoff.)

The Court: You may call your first witness.

Mr. Tonkoff: I think I will call Louis A. Boas as an adverse witness.

LOUIS A. BOAS

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Your name is Louis A. Boas? A. Yes.

Q. And where do you reside, Mr. Boas?

A. Moscow.

Q. And what is your occupation?

A. Editor of the Daily Idahonian.

Q. How long have you acted as such?

A. In that capacity since 1939.

Q. I assume as editor you know what your paper prints and must [4] ratify the articles that come out in the paper? A. Generally, yes.

Q. Mr. Boas, the Idahonian on May the 13th—a certain article came out in the paper on that date and referring to an article starting in the third column on Page 2, I desire to ask you if you knew when that article was published?

The Court: I think perhaps you better have it marked as an exhibit first.

Q. I believe it is in the third column on the second page of that exhibit marked for identification as Exhibit No. 1—that is a true and correct copy, of course, of that edition that came out?

A. That is correct.

Q. Dated May 13, 1953? A. Yes.

Q. And a part of that article is referred to in

(Testimony of Louis A. Boas.)

the complaint and I assume that you are acquainted with the complaint against the News-Review?

A. I read it sometime ago, yes.

Mr. Tonkoff: I now offer that exhibit in evidence.

Mr. Clements: I have no objection.

Mr. Greene: No objection.

The Court: It may be admitted.

Q. About what circulation does your paper have, Mr. Boas? [5] A. About 4200.

Q. And where is that circulation, in what counties is it circulated, does it go into Washington?

A. Latah County and some in Eastern Washington, that is, in Whitman County, in Pullman and Palouse.

Q. Now, 4200 circulation, that means that you would have about 14,000 readers, is that right?

A. I would say around 12,000, figuring three to a family.

Q. Where is the paper printed?

A. At Moscow.

Q. And about what is the size of your plant?

A. The size of the plant?

Q. Yes.

A. Well, I don't know the measurements.

Q. How many do you employ?

A. About 30.

Q. Is that a daily? A. Yes, it is a daily.

Q. This is a corporation, is it not, the News-Review? A. That's right.

Q. Who are the stockholders?

(Testimony of Louis A. Boas.)

Mr. Greene: I think I am going to object to that, if the Court please, the legal status of the corporation is admitted and I think it is immaterial who the stockholders are. [6]

Mr. Tonkoff: I guess maybe you are right on that.

The Court: Yes, I think that is right.

Q. What is the capitalization?

Mr. Greene: Now, I object to that also as immaterial.

The Court: He may answer.

Q. What is the capitalization, Mr. Boas?

A. I believe it is \$25,000.00.

Q. Are you familiar with the valuation of that plant—as a matter of fact it is worth about a quarter of a million dollars, isn't it?

A. I would not think so.

Q. What would you think it was worth?

A. Well, I would say possibly \$200,000.00—that would not be the plant, that would be the business, it might be worth that—I don't think that the plant would be over \$125,000.00 to \$150,000.00 that would be the entire business.

Q. And that would be the over-all value, you believe, at \$200,000.00?

A. That would be purely my guess, I never had it appraised or evaluated.

Q. Of course, Mr. Boas, you were familiar with this article, were you not? A. Yes. [7]

Q. And you sanctioned, approved and authorized the printing of it? A. Yes.

(Testimony of Louis A. Boas.)

Q. I assume that you were quite familiar and are quite familiar with the situation existing, as the Estes-Shoup situation, if I may refer to it in that manner?

A. Yes, as a newspaper editor I was familiar with it.

Q. On several different occasions prior to May 13, your paper had published articles concerning the dismissal by Judge Borg of the case of State vs. Estes?

A. We printed it once for each dismissal, I believe.

Q. You say once? A. Yes.

Q. Now, when did the dismissal take place?

A. The first one, you mean?

Q. Yes.

A. I think shortly after 9 o'clock in the morning and that was on January——

Q. ——January 15, 1953?

A. Yes, we published that dismissal the same day in the afternoon.

Q. And you also published it the following day?

A. There may have been reference to further facts of the case, I don't recall what was published the following day, but if there was any new situation or question of having a rehearing or something of that kind. [8]

Q. You also published it on the 19th, didn't you?

A. Well, you will have to show me the paper, I don't remember what I publish each day.

Q. Yes, I will show you—on April 19th you

(Testimony of Louis A. Boas.)

again referred to the dismissal by Judge Borg—on the 19th of April your paper again referred to that, to the same situation?

A. I would have to look at the paper to know what story you are referring to.

Q. Well, Mr. Boas, you know that you referred to it on May 13th?

A. We referred to the public meeting at the high school on May the 13th.

Q. And you also referred to the dismissal by Judge Borg—

Mr. Greene: —I will object to this, if the Court please, the article, of course, is the best evidence and it is not proper to be asking this witness as to the contents.

The Court: Yes, I imagine that it is a pretty hard strain for him to go back and remember the dates that he edited all of the articles in the paper and what they were.

Q. On May the 13th, I am referring now to an article—

The Court: —We will wait just a minute, Mr. Tonkoff, that noise is the sheriff and the deputy marshal trying to arrange some seats for those [9] who are standing.

Q. Would you like to refer to the paper, Mr. Boas?

The Court: Mr. Bailiff, hand the witness the paper, Exhibit No. 1.

Q. The 6th line from the top "Miscarriage of

(Testimony of Louis A. Boas.)

Justice," where that reference is made in the paper, that refers to Judge Borg, does it not?

Mr. Greene: I am going to object, if the Court please, the article speaks for itself and it has been admitted in the answer and counsel now is attempting to have the witness place an interpretation on the article and I think perhaps that is for the jury.

The Court: Yes, I think it is for the jury to interpret the article.

Q. Referring to the second column and commencing with the third paragraph, the word "Thomas" then made reference to legal maneuvers in which a hearing was set for January 15, at 9 a.m., and at 8 a.m. that day, Thomas explained that Alsager notified Judge Borg that he would be ready at 9. And Alsager and his witnesses were present at Police Court, normally the place where such hearings were held, but the Judge and Estes, Thomas said, had gone to the County Courthouse to hear the case. Calling your attention to substantially that language, your paper did refer to this dismissal as late as May 13, did it not? [10]

A. Mr. Thomas referred to it and we were reporting his address before the people.

Q. You mean that you think there is no responsibility on you because you were quoting Mr. Thomas, is that what you mean?

Mr. Greene: Again I object on the ground that this is a matter for the jury, and it is argumentative.

The Court: Yes, that is a question for the jury, questions of law, of course, are for the Court.

(Testimony of Louis A. Boas.)

Q. Now, I will ask you if you did not on the 16th refer to the dismissal, in the article on the 16th of January?

Mr. Greene: I object to that on the ground that the article is the best evidence as to its contents.

The Court: The objection is sustained.

Mr. Tonkoff: All right, I have the article here and I will offer it in evidence. I do not have the paper, I merely have the article, and I assure counsel and Court that it is the date.

The Court: You may have it marked.

Mr. Tonkoff: If they do question it I will have the witness produce the paper. I have another here also on the 16th, Mr. Bailiff, I offer each of [11] those.

Mr. Greene: I object to them, there is no claim that these articles are libelous in any way and they are, therefore, immaterial and do not tend to prove any issue in the case.

The Court: I think it should be confined to the article that is in the complaint.

Mr. Tonkoff: Your Honor, it is, it is offered in evidence for another purpose which I think I could make clear if Your Honor wanted me to make a statement in the presence of the jury, but I hesitate to do so.

The Court: I am not afraid of this jury, you can make your statement in their presence.

Mr. Tonkoff: I am not afraid of them either, but I thought perhaps the Court might object to it. The purpose of this is to show malice that didn't refer

(Testimony of Louis A. Boas.)

to it only once but on several different occasions, 2, 4, 6, 8, 10, 12, 13 times, and that goes to the punitive damages. If we can show that there were articles published subsequent and prior to the time to the article that the action is based on, this article, then, Your Honor, it will show they were malicious and Judge Borg would be entitled not only to compensatory but also to exemplary or punitive damages, that is my position, Your Honor. [12]

Mr. Greene: In the first place, Your Honor, the plaintiff has not asked for punitive damages, and second, these publications are entirely outside of the scope of the complaint for the reason that Paragraph Four of the complaint alleges the libel to be an article or quotation therefrom of which Captain Thomas was the author and which were printed in the Daily Idahonian and this article here has not been established as being in any way connected with the article which Captain Thomas is supposed to have turned over to the newspaper for publication. As a matter of fact, Your Honor, the complaint shows on its face that the Captain Thomas article was not written until the 12th day of May, 1953. Now, these newspaper articles refer to matters that took place in January, 1953, or four months before the alleged libel was even written by the defendant Thomas.

The Court: The objection will be sustained. I can't see anything in these articles but news, there is nothing to show any malice. There is nothing here to show any malice on the part of this witness.

(Testimony of Louis A. Boas.)

Mr. Tonkoff: In accordance with the ruling in the case of Dwyer vs. Libert which is an Idaho case, even though we have not specifically alleged exemplary damages they can be shown, according to that case, at least that is my understanding. [13]

The Court: I am not ruling on that question, I am just saying that these articles are nothing but publication of news and there is nothing in the article or either article to show any malice on the part of this witness.

Q. Now, I will ask you if you did not again mention the dismissal on April the 13th, in the article that I am going to show you, and Your Honor, I refer to that portion of the article marked in red—I show that for your examination.

The Court: I think you should have it marked and shown to counsel.

Q. I am referring to that place with the red mark at the bottom.

Mr. Greene: I am going to object to this until the exhibit is offered and received in evidence. I object to it for that reason before the witness identifies anything as to its content.

Mr. Tonkoff: Is there any question but that this is dated the 13th, Mr. Greene?

Mr. Greene: If you are offering the article I am going to object to it.

Mr. Tonkoff: I am offering it but, as I say, I have not yet laid the foundation, I am making [14] a statement that it is dated April 13th, coming now

(Testimony of Louis A. Boas.)

to the Idahonian I don't know that the article identifies itself as coming out of that paper and if there is any question about that, Your Honor, there may not be a proper foundation laid.

The Court: Maybe the witness can tell us whether it is out of his paper or not.

Q. Is it out of that paper, Mr. Boas?

A. I would say it was out of that paper, yes.

Mr. Tonkoff: Now, I offer it in evidence for that purpose, where there is the red mark.

Mr. Greene: Now, I object to it again on the ground that it antedates the alleged libel in the complaint and also it is incompetent, irrelevant and immaterial to establish malice on the part of the defendant and the newspaper of which he is the editor.

The Court: The objection will be sustained.

Mr. Tonkoff: If the Court please, I base my contention on the ruling in the case——

The Court: ——The Court has ruled.

Mr. Tonkoff: All right.

Q. Mr. Boas, did your paper carry articles or solicitations for the Dick Shoup defense fund?

Mr. Greene: I object to that as being [15] entirely immaterial, Your Honor.

The Court: Was that after this incident?

Mr. Tonkoff: No, it was before and this is on the proposition that I submitted on articles published subsequent and prior to the time the action was taken.

The Court: What was the question?

(Testimony of Louis A. Boas.)

Mr. Tonkoff: The question was whether the Daily Idahonian carried articles or advertisements for the Dick Shoup defense fund?

Mr. Greene: Now, your question is duplicitous, do you mean articles or do you mean advertisements?

Mr. Tonkoff: Well, it is in the form of an advertisement, Mr. Greene.

Mr. Greene: I again object to it as being wholly immaterial, there is no allegation of libel in connection with any Dick Shoup defense fund and on the ground also that it antedates any allegation in the complaint.

The Court: The objection will be sustained.

Mr. Tonkoff: Now, Your Honor, I have an article here which I will mark and I call Court's [16] attention to this article dated April the 9th.

The Court: This may be shown to counsel.

Mr. Tonkoff: I have marked it, Mr. Greene, where I contend the article is material.

The Court: Now, you may hand it to the witness, Mr. Bailiff.

Q. Was that article carried in the Idahonian, Mr. Boas? A. It appears to be, yes.

Mr. Tonkoff: I refer to the markings on the article again, Your Honor.

Mr. Greene: Are you offering it at this time?

Mr. Tonkoff: Yes, I am.

Mr. Greene: I object to that as being incompetent and immaterial and not tending to prove any

(Testimony of Louis A. Boas.)

issue in this case, there is no libel in this article and it antedates any libel alleged in the complaint.

Mr. Tonkoff: I don't know whether Your Honor wants to hear from me on this or not.

The Court: No, I will sustain the objection. I am not going to try anything here only the article that is before the Court.

Q. Did you, on occasion, refer to the same dismissal as late as April or May? [17]

Mr. Greene: We object to that as being irrelevant and immaterial.

Mr. Tonkoff: It is for the purpose of showing malice, Your Honor.

The Court: The objection is sustained.

Q. You had a reporter at the hearing, did you not, Mr. Boas?

A. Which hearing do you refer to?

Q. The first hearing, on January 15th?

A. Yes.

Q. And he was present in the courtroom when the dismissal took place? A. Yes.

Q. Did you make any investigation whatsoever concerning where the hearing was to be held?

A. Myself, no.

Q. Yet the article on May 13th was authorized by yourself? A. The reporter wrote the article.

Q. And you authorized the printing of it?

A. Yes, sir.

Mr. Tonkoff: That is all.

Mr. Greene: I have no questions.

The Court: You may step down, Mr. Boas. You may call your next witness.

Mr. Tonkoff: Mr. Alford, will you take the stand, please. [18]

A. L. ALFORD

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. For the record, will you state your name?

A. A. L. Alford.

Q. Where do you reside, Mr. Alford?

A. Lewiston, Idaho.

Q. And how long have you lived there?

A. About 45 years.

Q. And what is your occupation?

A. Publisher of the Lewiston Morning Tribune.

Q. What is the circulation of that paper?

A. At what time?

Q. Well, in 1953, on May 13th or in that immediate vicinity, about that time?

A. It would have been about 14,500.

Q. And that would mean about how many readers—about 40,000?

A. Well, I presume, it would be according to whatever formula you used to determine the readers.

Q. Have you any idea as to how many, the number of readers you have?

A. That would be a fair estimate, 40,000.

Q. Where does your paper circulate? [19]

A. It circulates primarily in the five north central Idaho counties around here, in Garfield, Asotin

and Southern Whitman Counties in Washington, and in Wallowa County in Oregon.

Q. Mr. Alford, did your paper carry the article which is mentioned in the suit against you, this present suit? A. I presume it did.

(A document handed to the witness.)

Q. Is that the article that you refer to?

A. Yes, sir.

Mr. Tonkoff: I offer this in evidence at this time.

The Court: It may be admitted. I take it that this is Exhibit No. 6.

The Clerk: No. 6.

Q. At the time this article came out, did you authorize or approve it?

A. That is not my function.

Q. What is your function with the paper?

A. The managing editor authorizes the articles.

Q. Who is the managing editor?

A. Mr. Bill Johnston.

Q. Is he here? A. Yes, sir, he is.

Mr. Tonkoff: That's all, Mr. Alford. [20]

Mr. Clements: No questions.

The Court: You got off easy, Mr. Alford.

WILLIAM F. JOHNSTON

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Will you state your full name for the record?

A. William F. Johnston.

Q. And what is your occupation or business?

A. I am managing editor of the Lewiston Morning Tribune.

Q. And do you have control, so to speak, of the articles that come out in the paper?

A. The news department is under my jurisdiction.

Q. Do you recall when this article of May 13 appeared?

A. Yes.

Q. You knew this was coming out, did you?

A. Yes, sir.

Q. And I assume that you authorized the printing of the article?

A. I made arrangements for having the meeting covered.

Q. And you knew what the contents of the article were?

A. I didn't see the article specifically myself before it was [21] printed.

Q. Was there any discussion concerning the article before it appeared in the paper, I mean with your reporters?

A. There was the normal discussion between the

(Testimony of William F. Johnston.)
city editor and the reporters in which I was not involved.

Q. Did you have a reporter present at the hearing on January 15, 1953? A. No, sir.

Q. May I ask you, Mr. Johnston, have you referred to the dismissal since January 15, 1953?

Mr. Clements: May I have that question again, please?

Q. Has the paper referred to the dismissal of the judgment by Judge Borg in the case of State vs. Estes between January 15, 1953, and May 13, 1953?

Mr. Clements: We object to that as being immaterial.

The Court: The objection will be sustained.

Mr. Tonkoff: That's all.

Mr. Clements: No questions. [22]

JOHN K. BORG

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Would you state your name, Mr. Borg?

A. John K. Borg.

Q. And what is your age—how old are you?

A. I will be 72 on the 31st of July.

Q. Are you married? A. Yes.

Q. Do you have a family? A. Yes, sir.

Q. How many children do you have?

A. Three children.

(Testimony of John K. Borg.)

Q. Where do you live now, Mr. Borg?

A. At Longview, Washington.

Q. Did you ever live at Moscow? A. Yes.

Q. When did you first move to Moscow, Idaho?

A. In the Fall of 1936.

Q. Before I forget it, you are the plaintiff in this action, are you not? A. Yes.

Q. What was your occupation in 1936? [23]

A. I started the Western Auto Supply Store here.

Q. How long were you operating that?

A. Approximately four years.

Q. What did you do after that?

A. Well, conditions got such that I could not get merchandise for my store and so I sold out this stock and took over the Richfield Service Station on North Main Street.

Q. How long did you operate that?

A. Approximately a year and a half.

Q. And what other occupations have you followed in Moscow?

A. I worked for a year and a half for Montgomery Ward at Pullman.

Q. That was at Pullman, Washington?

A. Yes.

Q. Did you do any other work here in Moscow?

A. I was the Justice of the Peace.

Q. Did you work for the Elks Club here, John?

A. Yes, sir.

Q. How long did you work for them?

A. About nine or ten years.

(Testimony of John K. Borg.)

Q. When did you become Justice of the Peace?

A. Well, I think it was about in '95 that I was first appointed.

Q. What did you say the year was?

A. It was about in 19——

Q. Wouldn't it be about 1944? [24]

A. About 1944 or 5, yes.

Q. Were you ever elected after that?

A. Yes, sir.

Q. What years, do you remember?

A. I was elected four times.

Q. When was the last time that you were elected Justice of the Peace—do you remember what year you were elected the last time?

A. It must have been in 1952.

Q. Were you also Police Court Judge while you were Justice of the Peace?

A. Part of the time, yes.

Q. Were you acting as Police Court Judge on May 13, 1953; were you working as police judge then?

A. No, I wasn't.

Q. You were just the Justice of the Peace at that time?

A. Yes, sir.

Q. Do you remember how long before January 13th you resigned or gave up the job of police judge?

A. Oh, it was a couple of months.

Q. Where did you hold hearings—preliminary hearings?

A. While I was Justice of the Peace?

Q. Yes.

A. At the courtroom in the Court House.

(Testimony of John K. Borg.)

Q. Do you remember Mr. Estes or Mr. Felton coming to the courtroom [25] on January 15?

A. Yes, sir.

Q. Prior to the 15th, the day before the 15th, tell us what happened concerning this case?

Mr. Clements: Are you referring to any particular date now?

Mr. Tonkoff: Yes, I am, the day before the 15th, which would be the 14th of January, 1953.

Q. On January 14, 1953, will you tell what happened?

A. I was at the Elks, in the courtroom, and the Probate Judge, Judge Martinson, brought down some papers. It was a case that was changed on a change of venue from the Probate Court to my court.

Q. And was the case set for hearing then?

A. Yes, it was.

Q. When was it set for?

A. It was set for nine o'clock the next morning, on the 15th.

The Court: We will take a recess at this time for 15 minutes.

April 5, 1954, 3:05 P.M.

Mr. Tonkoff: Counsel and I have agreed to the admission of this exhibit, if the Court please.

The Court: You may have the exhibit [26] marked.

Mr. Greene: As I understand it, the exhibit is a true and correct copy of all of the docket entries of

(Testimony of John K. Borg.)

the Probate and the Justice Court in the first case of the State of Idaho vs. Murray Estes.

Mr. Tonkoff: That is correct.

The Court: The exhibit may be admitted.

Q. Judge Borg, referring to the third page of Exhibit No. 7, I will ask you if that is a copy of the proceedings that took place, is that a report or is it a copy of your book, your docket book, of what took place: is this a typewritten copy of that?

Mr. Clements: We have agreed to that, Mr. Tonkoff.

Mr. Tonkoff: Very well, thank you, I wonder if I may read this to the jury.

The Court: Yes, I think there are quite a few exhibits that should have been read to the jury.

Mr. Clements: If we may make a suggestion, Your Honor, it occurs to us that if any more exhibits are to be read now, that these two newspaper articles should be read at this time, they are the gist of this action and——

The Court: ——Yes, that is right, I [27] know this, if I was sitting on the jury I wouldn't know what all this is about.

Mr. Clements: We thought if the proceeding was to be in a chronological order that the two newspaper articles should be read to the jury at this time.

The Court: I was wondering if you had photo-static copies of these articles.

Mr. Clements: Yes, we do, we have 14 photo-static copies of each of the articles.

(Testimony of John K. Borg.)

The Court: Then I will let them use the copies, rather than have you read them to the jury I will let the jury read them. They may be handed to the jury, each juror may have a copy if you gentlemen agree that they are correct copies.

Mr. Clements: If you will give me those articles that I gave you, Mr. Tonkoff, I can represent that these are true replicas of the Moscow, Idaho, paper. There are two words that are misspelled and they should be corrected.

Mr. Tonkoff: They can be corrected on the margin.

Mr. Clements: Very well.

The Court: I imagine that this jury is probably accustomed to misspelled words, I know they would be if they ever got any letters from me. Mr. [28] Bailiff, you may hand each juror a copy of each article. This article that I am handing the jury now, I understand, is from the Moscow paper.

Mr. Greene: That is the article in the Daily Idahonian.

The Court: Now, counsel, you may just sit down and relax. I am going to let the jury take their time and read these articles.

(Whereupon, the jurors read documents handed to them.)

The Court: You may proceed, Mr. Tonkoff.

Mr. Tonkoff: I will read Exhibit No. 7, if I may.

The Court: Yes, it may be read to the jury.

Mr. Tonkoff: Ladies and gentlemen of the jury, Exhibit, Plaintiff's Exhibit No. 7 reads as follows:

(Testimony of John K. Borg.)

“In the Probate Court of the County of Latah, State of Idaho. Docket. State of Idaho vs. Murray Estes. January 12, 1953: Richard L. Shoup filed a criminal complaint and deposition against the above-named defendant charging said defendant with the commission of a crime against the State of Idaho, to wit: Assault with a deadly weapon, a felony, alleged to have been committed in Latah County, State of [29] Idaho, on or about the 14th day of December, 1952.

“January 13, 1953: The above-named defendant appeared voluntarily waived the issuance of a warrant of arrest and demanded a preliminary hearing. A preliminary hearing was set for 9:00 o'clock a.m., on the 15th day of January, 1953, before Lloyd G. Martinson, Probate Judge. Said defendant was released on his own recognizance to appear at the preliminary hearing. Lloyd G. Martinson, Probate Judge.

“January 14, 1953: The following order was made and entered: In the Probate Court in the County of Latah, State of Idaho. State of Idaho, Plaintiff, vs. Murray Estes, Defendant. Order disqualifying Judge and changing venue.

“Lloyd G. Martinson, Probate Judge, being satisfied that he is disqualified from acting in the above-entitled matter for the reason that on several and **various occasions prior to his assumption of the duties of Probate Judge** he discussed the matters and things now set forth in the criminal complaint on

(Testimony of John K. Borg.)

file in said matter with various persons, including the complaining witness, Richard L. Shoup, and that during said discussions he expressed his opinion as to the merits of the matters and things now set forth in said complaint. [30]

“Now, therefore, on his own motion, and in furtherance of justice, Lloyd G. Martinson, Probate Judge, does hereby disqualify himself from acting further in the above-entitled matter except as to the doing of those things which shall be necessary in transferring the matter to another magistrate in accordance with law; and it is hereby ordered that the above-entitled matter be, and the same is hereby, transferred to the Justice Court of the Second Justice Precinct, Latah County, State of Idaho, before John Borg, Justice of the Peace. Dated this 14th day of January, 1953. Lloyd G. Martinson, Probate Judge.” And then follows the certificate which I shall not read. On the following page of the same exhibit, “State of Idaho, Plaintiff, vs. Murray Estes, Defendant. The above-entitled case, having been transferred to this Court on a change of venue by Probate Judge Martinson, was held in the courtroom of the Court House in Moscow, Idaho, on the 15th day of January, 1953. As sufficient time had elapsed after 9:00 o’clock a.m., the time set for the hearing and the prosecuting attorney and the complaining witness had not arrived, the defense attorney made motion to dismiss the case as there was no evidence submitted. The motion was sustained and

(Testimony of John K. Borg.)

the case dismissed. John K. Borg, Justice of the Peace."

Q. On the 15th day of January, Judge Borg, were you acting as Police Court Judge at that time?

A. No, sir, I wasn't. [31]

Q. Do you remember how long prior to January you had given up that position or had quit?

A. I couldn't say, but it was at least two or three months.

Q. While you were at the Elks Club and Judge Martinson had handed you the papers that you have referred to, did you see Mr. Alsager, the prosecuting attorney?

A. Yes, sir.

Q. And who is, or who was, Mr. Alsager?

A. He is the prosecuting attorney of Latah County.

Q. At that time, did he advise you as to whether or not he would appear in this case the following morning?

Mr. Greene: I am going to object to that, if Your Honor please, on the ground that it is hearsay and it was not made in the presence of either of the defendants.

Mr. Tonkoff: This, Your Honor, is for the purpose of proving the——

Mr. Greene: ——I will withdraw the objection.

The Court: I think the objection is good but, of course, I think it is all right also to let it in.

Mr. Greene: I have no objection, I will withdraw it.

Q. Did Mr. Alsager advise you as to whether or

(Testimony of John K. Borg.)

not he would [32] appear at the hearing on the following morning, on January 15th?

A. Yes, prior to that just a little bit, he came down to the Elks——

Q. ——You say, prior to this, when do you mean, Judge Borg?

A. Prior to the time of the answer of this question you are asking.

Q. Was that on the 14th or the 15th?

A. It was the 14th, in the afternoon.

Q. Was that after Judge Martinson had handed you the papers? A. Yes, sir.

Q. Now, will you state what was said?

A. Mr. Alsager came into the card room where I was—he called me out in the lobby and he said, “Did you get the papers in the Estes case?” and I said, “Yes, I just got them a few minutes ago.” And then he asked, he said, “Do I have to be there?” And I said, “Well, not as far as I am concerned.” I couldn’t see why I should call him and as he left he said, “Then I won’t come.”

Q. He said, “I won’t come”? A. Yes.

Q. On the 15th the hearing was had, the preliminary hearing was set for hearing? A. Yes.

Q. And who appeared at that time? [33]

A. I went to the courtroom in the Court House and Mr. Estes and Mr. Felton, attorneys, were there. There were some more people there but the only one that I can positively think of now was the Idahonian reporter.

Q. And was he there up to the time that you dis-

(Testimony of John K. Borg.)

missed the case? A. Yes, sir.

Q. And state what happened then?

A. Well, we sat there for what seemed an awful long time and there was not a word said, finally there was a motion by the defendant to dismiss the case—to dismiss the hearing.

Q. Was that motion made by Mr. Estes or Mr. Felton?

A. Mr. Estes. I looked at my watch and it was 15 minutes after nine. I didn't hear any objection to the motion and I waited just a little longer and I finally dismissed the case.

Q. Prior to that time, how long had it been since you had seen or talked to Mr. Estes, prior to this hearing?

A. I couldn't say, but it was at least six months.

Q. Since you had had any conversation or had seen him? A. That is right.

Q. Now Judge, after the 15th of January—along about the 13th, all right, after the 13th of May, you read this article? A. I didn't hear.

Q. After the 13th of May, did you read these articles (indicating) [34] that came out in the Daily Idahonian and the Lewiston Tribune?

A. Oh, yes.

Q. State what, if any, calls you received from people? A. You say calls?

Q. Yes, did you get any telephone calls from people? A. Yes.

Q. Will you state what was said to you at the time of the calls?

(Testimony of John K. Borg.)

Mr. Greene: Now, we object to that as hearsay and not in the presence of any of the defendants and not binding upon them in any way.

Mr. Tonkoff: This, Your Honor, is the exception to the rule.

The Court: I will let him answer, certainly these defendants should not be responsible for any telephone calls they didn't have anything to do with.

Q. What calls did you receive, if any?

Mr. Greene: May I add to the objection that the time and the place and the persons should be furnished before the contents of the call are asked for. This should be done as part of the foundation.

The Court: Yes, that is true, and the parties who made the calls.

Q. Could you identify the persons that called you? [35] A. No, sir.

Q. Did they give you their names?

A. One person did.

Q. And who was that?

A. The name was Kate Smith.

Q. And how long after the 13th did you receive that call?

A. That was not very many days, but I couldn't say the date.

Q. What was said to you?

A. She asked me why I didn't report the money that I had gotten from Estes for disposing of the case—why I didn't report it on my income tax report.

Q. Did you get any other calls?

(Testimony of John K. Borg.)

A. Yes, sir.

Q. Could you identify the people?

A. No, sir.

Q. Would they give you their names?

A. No, sir.

Q. How long after the 13th was this?

A. Well, it was the next week or so, I didn't pay any attention to it much.

Q. What was said to you?

Mr. Greene: Now, we object to this again, if the Court please, no foundation has been laid for these conversations.

The Court: Fix the time and the place. [36]

Mr. Tonkoff: Shortly after or, as he has said, the week after the 13th.

The Court: We have a lot of calls all mixed up here, we don't know which he is talking about.

Q. When was this second call that you referred to, how long after the 13th did you receive it?

A. I cannot tell you the date.

Q. Well, approximately?

A. Well, I think they were all pretty much within the week.

Q. And what was said at that time, Judge Borg?

A. Practically all of them hinged on whether I received any money from Mr. Estes to dismiss his case, and how much money I had received, and if I entered it on my income tax report, and things like that.

Q. Did you receive any anonymous letters?

A. Yes, I got some of them.

(Testimony of John K. Borg.)

Q. And what did you do with them?

A. I threw them away.

Q. Why did you throw them away?

A. Well, the fact was that I was disgusted with the whole thing and I didn't want to have them around.

Q. Can you state—do you remember the contents of those letters, what was said or written to you?

A. They were along the same line that the calls over the phone were. [37]

Q. Now, Judge Borg, did you notice any difference in the attitude of your friends toward you?

A. When?

Q. After the 13th?

Mr. Greene: I am going to have to object to that as being purely conclusion and a self-serving declaration that is called for by that question.

Mr. Tonkoff: Your Honor, in 110 A. L. R., if you care to hear from me.

The Court: Well, in the first place, the defendants could have no way in the world of meeting this evidence. In the second place, there is nothing to show that these articles in the newspaper were the cause of it. This was a matter of public concern and they may have had information from attending the meetings themselves. There is nothing to show that any of these conversations that he had or any of the calls that he received or any of the letters written were on account of the articles appearing in the newspapers. Unless he can lay the foundation that

(Testimony of John K. Borg.)

the articles in the newspapers were responsible for it, of course, it would be objectionable and these men here are charged only with this article that appeared in the papers. I think it is highly prejudicial testimony to be allowed in. He is testifying about something that may [38] not have had anything to do with the articles in the newspapers.

Mr. Tonkoff: Your Honor, I cite you as authority, 110 A. L. R., the holding of the Court's areas that the plaintiff in this type of case can testify as to the change of attitude of his friends and acquaintances toward him.

The Court: I don't think that you can cite me that authority. I will be glad to have it before I rule but I know of no authority to the effect that because they had a mass meeting over here, citizens got together and criticized the action taken, that these men would be responsible for it in any manner. Now, I will look at your authority before I rule because if there is such authority, of course, I don't claim to know all the law and I will be glad to take any authority that you have. You understand my position, it is that these defendants—this was a matter of public concern here in Moscow, they were having mass meetings, people were meeting, it was a matter of general public interest and opinion and whether these newspapers had anything to do with these letters or telephone calls being made—the letters being written or the calls being made to this witness would be just pure speculation and pure guess.

Mr. Tonkoff: Of course, the things that [39]

(Testimony of John K. Borg.)

were said at one of the meetings by one of the defendants, Thomas, were republished.

The Court: Yes, but the party that called him may not have read that article at all, they may have been upset over the dismissal of the case. It may have been some student from the University, or it could have been any of a great many people, and certainly you can't expect this jury to hold these defendants responsible for some other citizen's criticism of the action of this man unless, of course, it came from the newspaper article. I will take any authority you have to offer.

Mr. Tonkoff: So that I will understand Your Honor's ruling, I will refrain from this type of questioning under these circumstances at this time and I will not continue.

The Court: Very well, of course, you understand, I am perfectly willing that you may change my mind if you have any authority to that effect.

Mr. Tonkoff: And as I say, under those circumstances, I will not continue on this line of questioning.

The Court: And the testimony in regard to the telephone conversations and the letters will be stricken and the jury instructed to disregard [40] that.

Mr. Tonkoff: I will excuse this witness for the present until I furnish Your Honor with the authority.

The Court: I will take a recess at this time if you desire.

Mr. Tonkoff: I have another witness that I can go ahead with.

The Court: Do you desire to cross-examine up to this point in the examination of this witness?

Mr. Clements: We do not.

Mr. Greene: No, Your Honor.

Mr. Tonkoff: We will call Judge Martinson.

LLOYD G. MARTINSON

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Will you state your name?

A. Lloyd Martinson.

Q. What is your profession?

A. I am a lawyer and the Probate Judge of Latah County, Idaho.

Q. How long have you acted as such Probate Judge?

A. I was sworn in on January 12, 1953.

Q. How long have you practiced law in this community?

A. I started in 1950, in November of 1950. [41]

Q. Exhibit No. 7, which is on the reporter's desk, is a true and correct copy of your books, is that right?

A. This is a true and correct copy of an instrument which was introduced in evidence in my court on a hearing on a motion.

Q. Referring to the first page of Exhibit No. 7,

(Testimony of Lloyd G. Martinson.)

you set the preliminary hearing of this case before you, did you not? A. Yes, I did.

Q. Where do you hold hearings?

A. At the Court House.

Q. Then after that you disqualified yourself and had Judge Borg hear it? A. Yes, I did.

Q. Where are preliminary hearings held in this county, Judge Martinson?

Mr. Greene: I shall object to that, there is no foundation laid for this witness to testify as to where preliminary hearings are held except those that he holds.

Mr. Tonkoff: If he knows where other courts hear them?

Mr. Greene: Or those that he may have participated in.

Mr. Tonkoff: He has been a practicing [42] lawyer since 1950, he ought to know.

The Court: Of course, I would not admit it on that account. If he knows where other courts are held besides his own court, he may testify.

Q. Do you know where preliminary hearings are held in this County?

A. I know where some of them are held, yes.

Q. Where? A. At the Court House.

Mr. Tonkoff: That's all, Judge.

Cross-Examination

By Mr. Clements:

Q. What do you mean by preliminary hearing?

A. I mean a preliminary examination of felons or persons accused of committing a felony.

(Testimony of Lloyd G. Martinson.)

Q. That is, where a complaint is sworn out before a committing magistrate charging a citizen with the commission of a felony and the committing magistrate holds a hearing to determine whether or not probable cause exists as to whether a crime has been committed? A. Yes.

Q. And the testimony submitted at that kind of a hearing is required to be taken down in shorthand, transcribed and later sent to the district court, is that correct? [43]

A. That is the procedure in my court, yes.

Q. And as the Probate Judge, you are the committing magistrate, aren't you? A. Yes.

Q. Had you ever participated as a lawyer, in a preliminary hearing where a man was charged, a man or woman was charged with a felony?

A. Yes, I had one.

Q. And where was that held?

A. That was before Judge Peterson, my predecessor in the probate court, and that was held in his office.

Q. That was in the probate court's office, wasn't it? A. Yes, it was.

Q. And one of the reasons that preliminary examinations are held, in felony cases, at the Court House is so that you will have access to the official court reporter of Latah County, isn't that correct?

A. Well, I don't know why I hold them there. I just presumed that one of the reasons is that the facilities are better.

Q. Now, this complaint in the matter of the State

(Testimony of Lloyd G. Martinson.)

of Idaho against Estes, matter No. 6292, of which your docket has been introduced here, you are the judge before whom the original complaint was filed on January 12, 1953, is that correct?

A. That is correct, yes. [44]

Q. Was a warrant of arrest issued for the defendant? A. No, there was not.

Q. Isn't it usual where a felony complaint is issued against a citizen that a warrant of arrest is issued?

A. It depends. Sometimes we do and sometimes we don't.

Q. The defendant in that case was charged with assault with a deadly weapon, was he not?

A. Yes, he was.

Q. And you consider that a rather serious crime, do you not?

Mr. Tonkoff: That is objected to as incompetent, immaterial and irrelevant and it is outside of the scope of the direct examination.

Mr. Clements: It is preliminary, Your Honor.

The Court: He may answer.

A. Yes, sir, I would consider it rather serious.

Q. By what means was the defendant brought before you as a committing magistrate?

A. I believe that I telephoned him and told him that a criminal complaint had been filed against him and asked him to appear.

Q. That was on the same day that the complaint was filed? A. I believe so.

(Testimony of Lloyd G. Martinson.)

Q. When did he appear then?

A. He appeared the next day. [45]

Q. Did you set any time that he should appear before you? A. No, I did not.

Q. Then when did you disqualify yourself?

A. It was on the 14th, I believe—my docket shows that, I don't recall exactly—yes, it was on the 14th, the 14th of January.

Q. The complaint was filed on January 12, 1953, according to your docket? A. Yes, sir.

Q. And wasn't that the same day that you, as Probate Judge, and Mr. Alsager, as Prosecuting Attorney, were sworn in? A. Yes.

Q. And how long after you were sworn in was it that the complaint was filed?

A. About 10 minutes after I was sworn in, I would say it was between 10 minutes and a half hour.

Q. What time of the afternoon were you sworn in? A. It was around 2 o'clock.

Q. Had Mr. Alsager ever been Prosecuting Attorney before? A. No.

Q. He had not been Prosecuting Attorney up to that time? A. No, he had not.

Q. You and he were admitted to the bar at the same time, were you not?

Mr. Tonkoff: That is objected to as [46] improper cross-examination and it is outside of the scope of the direct examination.

Mr. Clements: I will withdraw the question to save time.

(Testimony of Lloyd G. Martinson.)

The Court: Very well.

Q. On January 12, the date that this complaint was filed, did you give any information or did you call Mr. Alsager's attention to the filing and the existence of the complaint in your court?

A. I don't recall whether I did or not. Mr. Alsager would know that, I don't recall.

Q. You have no recollection of calling him up or communicating with him on that day?

A. I just don't recall whether I did or didn't.

Q. Do you recall any communication or conversation with him as to whether it met with his approval not to issue a warrant for Mr. Estes on that day?

A. No, I did not.

Q. You did not? A. No, I did not.

Mr. Clements: That is all.

Cross-Examination

By Mr. Greene:

Q. Judge Martinson, you set the time for the preliminary hearing in this matter in your court, in the courtroom [47] of the Probate Court, on January 15?

A. I set it before me, I don't believe that I specified the place.

Q. Will you refer to your docket, please? See if it was not set at the Probate Court?

A. The preliminary hearing was set for 9:00 o'clock a.m., on the 15th of January, before Lloyd G. Martinson, Probate Judge.

(Testimony of Lloyd G. Martinson.)

Q. Do you have a separate courtroom from the district courtroom?

A. I have an office next to the district courtroom, yes.

Q. Is that ordinarily where you hold court?

A. I have my estate hearings there customarily, but I ordinarily hold trials of misdemeanor cases and preliminary examinations in the courtroom, the district courtroom.

Q. On the morning of the 15th of January, 1953, did anybody appear at your courtroom that morning? A. No, sir.

Q. Did anybody contact you inquiring about where the preliminary hearing was to be had or held? A. Yes, I think Peggy Estes.

Q. Who? A. Peggy Estes.

Mr. Clements: Don't you mean Peggy David?

A. Yes, pardon me, Peggy David. [48]

Q. About how long after 9:00 o'clock was it that Peggy David called you? A. I don't recall.

Q. Did you see Mr. Borg, the plaintiff in this action, that morning?

A. No, I don't recall seeing him.

Q. Did you see Mr. Estes? A. Yes, sir.

Q. At the courthouse? A. Yes.

Q. Was that before or after Mr. Borg had dismissed the case, if you know?

A. I don't know, possibly it was before or after. I don't recall.

Q. Can you tell us where the room is where you hold office with reference to the district courtroom

(Testimony of Lloyd G. Martinson.)

that you spoke of where you hold trials and preliminary hearings?

A. If this was the district courtroom (indicating) there is a double door going out here and my office sets there, over that way, you go out these double doors and turn to my office like that (indicating).

Q. There is a hallway? A. Yes.

Q. And your office sets on the north side of the building? A. On the west. [49]

Q. On the west side? A. Yes, sir.

Q. And the County Superintendent's office is across the hall on the south side?

A. It used to be across on the east side.

Q. On the east side, yes. The district courtroom sets then on the north side?

A. Yes, the north side.

Q. And also partly on the east?

A. Yes, it is partly.

Q. Can you tell me how far it is from the door of the district courtroom to the door of the room of your office—let me repeat that, please. Can you tell me how far it is from the door of the district courtroom to the door of your office room?

A. Probably four or five steps, I imagine.

Q. How far is it from the door of the district courtroom to the door of the office that you say was occupied by the County Superintendent?

A. About the same.

Q. Do you have a telephone in your office?

A. Yes, sir, I do.

(Testimony of Lloyd G. Martinson.)

Q. And did you have, on January 15th?

A. Yes, sir, I did.

Mr. Greene: I believe that is all. [50]

Mr. Tonkoff: That is all.

The Court: We will adjourn at this time until 10:00 o'clock tomorrow morning.

April 6, 1954, 10:00 A.M.

ROY D. GUERNSEY

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. For the record, your name is Roy D. Guernsey?
A. Yes, sir.

Q. Where do you live, Mr. Guernsey?

A. Oniwa.

Q. Are you married? A. Yes, sir.

Q. Do you have a family? A. Yes, sir.

Q. What is your occupation, or rather, what was it in May of 1953?

A. I was a tavern operator.

Q. And where was your tavern?

A. Oniwa.

Q. And do you recollect having read—what papers are distributed [51] in that area where you reside?

A. The Spokesman Review and the Daily Idahonian.

(Testimony of Roy D. Guernsey.)

Q. Do you remember an article in the Daily Idahonian on May 15, 1953? A. Yes.

Q. And do you remember reading the article?

A. Yes.

Q. After you read that article what impression did you derive from it concerning Judge Borg?

Mr. Greene: I will have to object to that as being purely a conclusion on the part of this witness.

The Court: The objection will be sustained.

Q. Did you have any discussion with anybody concerning this article after its appearance in the paper? A. Yes, sir.

Q. And with whom?

A. With Sergeant Clink.

Q. And when did that occur?

A. I think it was the Sunday after that article came out in the paper.

Q. Did he make any reference to that article in the discussion? A. Yes.

Q. Where did that conversation take place? [52]

A. In the tavern.

Q. Will you state what was said concerning the article and concerning the plaintiff?

Mr. Greene: We object to that as hearsay, also that it is a self-serving declaration and no proper foundation is laid and it does not tend to prove any issue in this case.

The Court: The objection is sustained.

Mr. Tonkoff: I would like to make an offer of proof.

The Court: The jury may retire.

(In the absence of the jury).

OFFER OF PROOF

Mr. Tonkoff: The plaintiff offers to prove through this witness that after reading the article he was impressed with the fact that Judge Borg was corrupt and dishonorable and that he derived that opinion solely from reading the article which is the subject matter of this litigation, which article appeared in the Daily Idahonian, May 13, 1953. Plaintiff offers to prove further through this witness that a discussion was had with a Sergeant Clink, attending the university, who was in his place of business the following Sunday, at which time he inquired of this witness if he had read the article and that Sergeant Clink made the statement to this witness that after examining and reading the article there was no [53] doubt but that the judge was dishonest and corrupt.

I base the admissibility of this evidence on 12 A. L. R. Second—I have indicated on the page——

The Court: ——You may hand them to the bailiff and he will bring them to me.

Mr. Tonkoff: In my opinion this is authority to admit this evidence.

The Court: The offer of proof will be rejected.

Mr. Tonkoff: If the Court please, I have a couple——

The Court: ——The Court in this case which you hand me, after commenting on this evidence, says that in character it is generally incompetent and that there was reversible error in admitting it.

Mr. Tonkoff: I have two or three other witnesses who would testify along the same line and in the absence of the jury I would like to make an offer of proof as to their testimony.

The Court: It will be understood that the offer has been made and the same ruling by the Court.

Mr. Tonkoff: Those witnesses, for the record, are Roland Noland, Tom Campbell and Mr. Nerk.

Mr. Clements: I wonder if counsel would give us the addresses of those witnesses. [54]

Mr. Tonkoff: Mr. Noland is a merchant, I understand, at Bovill; Mr. Tom Campbell is from Clarkston and Mr. Nerk is from Potlach. I will recall Judge Borg.

JOHN K. BORG

recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Judge Borg, after you read this article, what impression did you receive, or how did you feel?

Mr. Greene: We object to that, if the Court please, as calling for a conclusion of the witness and a self-serving declaration.

Mr. Tonkoff: Well, if it exhilarated him then, of course, there would be no damage, but if it affected him otherwise, there might be.

The Court: Yes, it would be a self-serving declaration, but I will let him answer.

A. Well, it made me feel bad, there had been several articles in the paper prior to that——

(Testimony of John K. Borg.)

Mr. Greene: ——Now, if the Court please, I think this matter was——

The Court: ——Yes, I will not hear from you, Mr. Greene. In view of my other ruling I cannot permit [55] him to testify as to other articles. I examined those other articles that were presented here to the Court and, as I said, there was nothing in them that anyone could take any offense at, they were just publications of news, and even though there is no objection having ruled on that matter I will not permit the testimony at this time.

Q. After the appearance of those articles, would you state if there was any change in the attitude of your friends?

Mr. Greene: Now, I object again. He has reference to a series of articles and there is only one article in issue here.

Mr. Tonkoff: I will confine that to the appearance of these articles in May, May 13th.

Mr. Greene: Then confined to that I have no objection.

Q. After the appearance of the article of May 13, Judge Borg?

A. Well, I noticed a lot of change.

Q. Will you state what that was?

A. Well, people that I had known and had been friendly with and that always had recognized me, after these articles of different kinds appeared, they, when I met them, wouldn't recognize me; they sort of walked away. I spent some time at the Elks

(Testimony of John K. Borg.)

Lodge, and the fellows around there were, well, I would say they were frigid in their attitude—in fact, I asked one of them what was wrong with them. [56]

Mr. Greene: I will have to object again, your Honor, this is calling for a conversation not in the presence of any of the defendants.

The Court: Yes, the objection will be sustained.

Q. Judge Borg, did you feel any differently from a physical standpoint, or from a nervous standpoint?

A. Well, practically from the very first it made me terribly nervous, I lost considerable sleep at night and practically every morning I would wake up with a headache and have headaches pretty near all day.

Q. When did you move to the State of Washington? A. The first part of September.

Q. And prior to moving to Washington were you working, that is immediately before moving to Washington?

A. I was the night clerk at the Washington Hotel in Pullman.

Q. And in the last two or three months before this trial where have you been living?

A. Before?

Q. Yes, before coming here to Moscow for the trial where had you been living?

A. I was living at Longview, Washington.

Q. Do you have any relatives there?

A. Yes, sir.

(Testimony of John K. Borg.)

Q. And who are the relatives? [57]

A. A married daughter.

Q. Now, Judge Borg, at the time of the hearing on the 15th of January, did you know where Mr. Alsager was at the time that Mr. Estes, Mr. Felton, the court reporter and the reporter for the *Idaho-Nian* and other people were in your office, did you know where Mr. Alsager was?

A. No, sir, I didn't.

Q. Judge Borg, what was the size of the room, in the police court, the room where you used to hold police court? A. It was about 12 by 12.

Q. Were there any desks in the room?

A. Yes, two desks there.

Q. Do you recollect how many chairs were in there? A. Approximately six or seven.

Q. As Justice of the Peace did you ever have an office there after you ceased to be police judge?

A. No.

Q. Did you have any office down there at the time of the hearing, on January 15?

A. No, I didn't.

Q. Now, Judge Borg, when a witness does not appear, and I am talking about the complaining witness now, and a motion is made for dismissal, with nobody present to represent the defendant, will you tell what is the proper procedure?

Mr. Greene: We object to that as calling [58] for a conclusion of the witness and invading the province of the Court and the jury.

Mr. Tonkoff: I assume, your Honor, that Judge

(Testimony of John K. Borg.)

Borg is an expert on this and I refer your Honor, respectfully, to Volume 243 of the Pacific, just a moment, I have the citation here, which, in my opinion, allows such testimony to be introduced and——

The Court: I think, Mr. Tonkoff, that it would be error under the circumstances here to admit such testimony and I will sustain the objection.

Mr. Tonkoff: Your witness, that is all.

Cross-Examination

By Mr. Clements:

Q. Mr. Borg, do you hear better through one ear than the other? A. What did you say?

Q. Which ear do you hear the best with—do you hear my voice now? A. I hear some of it.

Q. Do you hear better with one ear than the other? A. Yes.

Q. Which ear is your best ear?

A. This is the bad one (indicating).

Q. The right one is your bad ear?

A. Yes. [59]

Q. And you hear better out of your left ear?

A. Yes, sir.

Q. Are you having any difficulty in hearing me now? A. No, I can hear you.

Q. You understand my words in the voice I am speaking in now, do you not? A. Yes.

Q. When did you say you were first elected Justice of the Peace in Latah County?

(Testimony of John K. Borg.)

A. I didn't get that question.

Q. When did you say you were first elected Justice of the Peace in Latah County?

A. I think it was in 1944.

Q. And when were you next elected?

A. At the following election, 1946.

Q. And were you elected after that time?

A. You say how many times?

Q. Well, how many times were you elected Justice of the Peace? A. Four times anyway.

Q. When was the last time that you were elected? A. It must have been in '52, 1952.

Q. Were you Justice of the Peace on May 13, 1953—pardon me, on January 15, 1953?

A. No.

Q. Now, I want you to be sure to understand my question, [60] were you Justice of the Peace, January 15, 1953? A. No, I don't think I was.

Q. Do you recall the date January 15, 1953? Does that date recall any particular incident to your mind? A. Yes, sir.

Q. What incident does the date of January 15, 1953, recall to your memory?

A. There was a case transferred to my court from the court of Probate, that was on the 14th and the case was set for the 15th, the next morning at 9:00 o'clock.

Q. And were you Justice of the Peace on that date. Were you a Justice of the Peace on January 15, 1953? A. Yes.

(Testimony of John K. Borg.)

Q. And when had you been elected the last time prior to that?

A. Well, it was during the Fall of 1952.

Mr. Clements: I wonder if I may take my chair and move up closer to the witness?

The Court: Yes, you may move right up there, if his left ear is the best you had better stay on that side.

Q. Do you hear me better now, Judge Borg?

A. Yes, sir.

Q. And do you hear my words so that you understand what I am talking about? A. Yes.

Q. How long have you known Murray Estes on January 15, 1953? [61]

A. I came here in 1936. I don't remember just when I met him, but I would say I had known him ever since.

Q. Had he transacted much business in your court as a lawyer prior to January 15, 1953?

A. Not very much.

Q. Had he engaged in the participation of preliminary hearings prior to January 15, 1953, in your court? A. What was that, Mr. Clements?

Q. Had he participated in any preliminary hearings or preliminary examinations in your court prior to January 15, 1953?

A. I didn't quite hear that.

Mr. Clements: I will withdraw the question.

Q. Were you a Justice of the Peace at any time when Mr. Estes was prosecuting attorney of Latah County? A. No.

Q. You did know on January 15, 1953, that Mr.

(Testimony of John K. Borg.)

Estes had been prosecuting attorney of Latah County? A. Yes, I knew that.

Q. And you knew him during the time that he held the office of prosecuting attorney of Latah County? A. What was that?

Q. You knew him during the time that he held the office of prosecuting attorney of Latah [62] County?

A. Well, I guess I knew him when I saw him, that was about all.

Q. How long had you known Mr. Alsager prior to January 15, 1953?

A. Well, perhaps a couple of years.

Q. Had he ever conducted any business in your court before you as Justice of the Peace, as a lawyer? A. Yes, sir.

Q. How many occasions, to the best of your memory?

A. One that I remember especially, I don't know whether it was more than that or not.

Q. And was that a civil or a criminal matter?

A. A civil matter.

Q. Do you recall any criminal matter that he and Mr. O'Donnell appeared before you?

A. I am pretty sure they did.

Q. You are sure that he and Mr. O'Donnell did appear before you in a criminal matter?

A. I would say that he must have.

Q. At the times that he did appear before you as Justice of the Peace where did you hold court?

A. When he appeared?

(Testimony of John K. Borg.)

Q. At the time that Mr. Alsager transacted business before you as Justice of the Peace did you hold court?

A. This particular case was held in the Police Courtroom.

Q. In the City Hall? [63] A. Yes, sir.

Q. In Moscow, Idaho? A. Yes, sir.

Q. Did you ever have any business or transact any business with Mr. Alsager, as Justice of the Peace, up at the Latah County Courthouse prior to January 15, 1953? A. I don't think so.

Q. Do you know what date Mr. Alsager had been sworn in as prosecuting attorney in January, 1953?

A. What was that?

Mr. Clements: I will withdraw that question.

Q. What date in January was the first day that you had any conversation with Mr. Alsager pertaining to the case of the State of Idaho vs. Murray Estes?

A. On the afternoon of the 14th of January.

Q. And where did that take place?

A. It was at the Elks Lodge.

Q. At about what time of the day?

A. About four in the afternoon.

Q. How long had Mr. Alsager been prosecuting attorney at that time?

A. Approximately two weeks, I would guess.

Q. Do you know when he was sworn into office—when he took his oath as prosecuting attorney of Latah County? [64]

A. You say where his office was?

(Testimony of John K. Borg.)

Q. No, when he was sworn in as prosecuting attorney? A. I don't recall.

Q. You at that time knew that Mr. Martinson was the Probate Judge of Latah County?

A. Yes, sir.

Q. And you knew that Mr. Martinson on January 14 at the time he delivered papers to you, he knew that he had been in office only a couple of days? A. Yes, sir.

Q. And you knew that both Mr. Martinson and Mr. Alsager had been sworn into office on January 12, 1953?

A. That is possible, but I didn't try to keep track of those dates, but I suppose it was on that day.

Q. Whatever date it was, you did know that these two young men had only been public officers for a day or two? A. Yes.

Q. And you knew that was their first term in their respective office, as probate judge and prosecuting attorney? A. Yes.

Q. And you knew that they were inexperienced in the law?

Mr. Tonkoff: That is objected to as calling for a conclusion.

A. I don't suppose——

Mr. Clements: Just a minute, that has been [65] objected to.

The Court: He may answer.

A. I don't suppose they had any experience in these particular offices.

(Testimony of John K. Borg.)

Q. Now, on January 15, 1953, you had been a Justice of the Peace for several years in Latah County? A. Yes.

Q. Have you any idea how many preliminary examinations you had conducted up until that time?

A. Three or four or five, I cannot tell exactly.

Q. You had held the office of Justice of the Peace while Mr. Maury O'Donnell was the prosecuting attorney? A. Yes, sir.

Q. And he had business before you as Justice of the Peace? A. Yes, sir.

Q. As prosecuting attorney? A. Yes.

Q. You had transacted quite a lot of business with Mr. O'Donnell, hadn't you, that is, as Justice of the Peace?

A. Not very much I wouldn't say, however, we had some.

Q. Do you recall who was Mr. O'Donnell's predecessor in office, who was the prosecuting attorney of Latah County before Mr. O'Donnell?

A. I think it was Mr. Estes.

Q. Do you recall conducting any preliminary examinations while [66] Mr. Estes was prosecuting attorney? A. No.

Q. When was the first contact or association that you had with Probate Judge Martinson about this case?

A. The first time was on the 14th, the afternoon when he gave me the papers.

Q. On January 14, 1953, did you have any busi-

(Testimony of John K. Borg.)

ness in the city of Moscow for the transaction of business? A. No, I didn't.

Q. You were not engaged in any other business at that time, were you? A. When?

Q. On January 14, 1953?

A. Any other kind of business, you mean?

Q. Yes. A. No, I wasn't.

Q. The only other occupation or business that you were occupying at that time was Justice of the Peace? A. Yes, sir, I think that is right.

Q. And the only place that you conducted your business as Justice of the Peace in civil matters and misdemeanors was at the Police Station, wasn't it?

A. Yes.

Q. You transacted quite a little business as Justice of the Peace down at the Police Office? [67]

A. Yes, sir.

Q. Is that where you held your small claims court? A. Yes, sir.

Q. And isn't that where you presided over cases where people were being tried for misdemeanors?

A. You mean traffic violations and such?

Q. Do you understand what a misdemeanor is?

A. It is a lesser case than a felony or something like that.

Q. What kind of a lesser case than a felony?

A. Well, the penalty is not as severe.

Q. Do you know the difference in law between a misdemeanor and a felony, what distinguishes the crime as a misdemeanor and what distinguishes it as being a felony?

(Testimony of John K. Borg.)

Mr. Tonkoff: We object to that as not being proper cross-examination, your Honor. It is not within the scope of the direct.

The Court: I think it goes to the question that we have before us, he may answer.

Mr. Clements: I will have the question read to you, Mr. Borg. Will you read it, Mr. Reporter?

(Question read by reporter.)

A. There is a difference in the jurisdiction, if it is a civil matter and it involves more than \$300.00 it would come outside of the jurisdiction of the Justice of the Peace, or the amount that is stipulated in the Code consisting of,—I [68] cannot think of the term I want to use.

Q. What jurisdiction do you have as Justice of the Peace over criminal matters, what did you understand your jurisdiction to be as Justice of the Peace in criminal matters on January 15, 1953, where people were charged with a crime?

A. I didn't get that.

Q. What was Mr. Estes charged with in your court on January 14, 1953, what kind of a complaint was filed against him, what crime was he accused of having committed?

A. He was charged with accosting someone with a deadly weapon.

Q. Is that all you know about that crime? What jurisdiction did you have over that crime, what did you understand that your duty was when it came before you?

(Testimony of John K. Borg.)

A. When a case like that comes before the Justice of the Peace the procedure is to find out—in other words, there has to be a preliminary hearing.

Q. What is a preliminary hearing for so far as the Justice of the Peace is concerned?

A. It gives the defendant a chance—the purpose of it is to find out whether he is really a felon or not, I guess, or to find out if he wasn't.

Q. Exactly what did you understand your duty to be, did you have to determine whether Mr. Estes was guilty or was there another premise that you were supposed to determine? [69]

A. Well, it would be up to the Justice of the Peace according to the testimony or what have you, whether or not it would be justifiable to dismiss the case to have it transferred to the district court.

Q. On January 15, 1953, what did you consider your duty to be relative to the protection of the interest of the State of Idaho—the State of Idaho was the party plaintiff in that action, was it not?

A. Yes.

Q. And the proceeding was being prosecuted in the name of the State of Idaho by the prosecuting attorney of Latah County, wasn't it?

A. Yes.

Q. And what did you consider your duty to be there in determining the interest of the State of Idaho in that charge?

A. The interest of the State of Idaho was to prove whether or not the defendant was guilty of the charge.

(Testimony of John K. Borg.)

Q. Is that what you understood your duty to be on that day? A. Yes.

Q. Had you ever read the Statute prior to that date as to what your duty was on that day and as to what it actually consisted of?

A. I read some, not extensively.

Q. As a matter of fact, you did know on that date that the only official duty you had, required you to examine the evidence [70] that was submitted and to determine whether there was probable cause to believe that a crime had been committed. You knew that you had no jurisdiction to determine whether the defendant was guilty of a crime or not and you knew that all you had to do and what your official position was, was to listen to the testimony put on by the State of Idaho and determine as Justice of the Peace, whether there was probable cause to determine whether a crime had been committed, did you know that or didn't you?

A. If the complaint was a fact then there would be no question about it.

Q. What was that, Mr. Borg?

A. If the complaint was a fact there would be no question, but as Justice of the Peace I didn't know whether that was a fact or not.

Q. You knew that the complaint charged a very serious crime, didn't you? A. Yes, sir.

Q. And you knew and regarded, as a citizen and as a judge, that the crime of assault with a deadly weapon was a very serious felony charge, didn't you? A. Yes, sir.

(Testimony of John K. Borg.)

Q. And you knew that charge had been laid against a citizen by the officers of the State of Idaho, didn't you? A. Yes, sir. [71]

Q. And you dismissed that charge without hearing any evidence, on the motion of the defendant, didn't you?

A. On what kind of a motion, did you say?

Q. On the motion of the defendant. When Mr. Felton got up and stated that the prosecuting attorney and the witness were not there and made the motion to dismiss you granted that motion, didn't you?

A. It was something like that, yes.

Q. And you didn't send the sheriff to try to locate the prosecuting attorney, did you?

A. No, sir.

Q. And you didn't go to Mr. Martinson's telephone or endeavor to get to any other telephone to determine where Mr. Alsager was, did you?

A. No, sir.

Q. And you had a telephone conversation with Mr. Alsager at eight o'clock that morning, didn't you? A. Yes, sir.

Q. And Mr. Alsager told you at eight o'clock that morning that he would be at the hearing at nine o'clock, didn't he? A. Yes, sir.

Q. And you didn't tell Mr. Alsager at eight o'clock that morning where this hearing was to be held, did you?

A. No, he didn't ask and I didn't tell him. I don't think that I told him.

(Testimony of John K. Borg.)

Q. And you didn't tell Mr. Alsager, at four o'clock the day [72] before, at the Elks Club, where you were going to hold that hearing, did you?

A. No, I didn't, the time and the place was set in the complaint or when the case was transferred on an affidavit of prejudice from the court of probate to my court and I had been served with the papers. I took them out of my pocket and I don't know whether Mr. Alsager looked at them or not.

Q. When Judge Martinson delivered those papers to you between four and five o'clock on the afternoon of January 14, you read them, didn't you? A. Yes.

Q. And in those papers that you read, you saw the case was set for hearing at the Probate Court, didn't you? A. At the Probate Court?

Q. Yes, at the Probate Court, you saw that, didn't you?

A. My impression was that it was at the courtroom at the Courthouse.

Q. Didn't you read those papers, Mr. Martinson turned over to you that afternoon? A. Yes.

Q. Before you talked to Mr. Alsager?

A. I looked them over right away when I got them.

(Exhibit No. 7 handed to witness.)

Q. Will you examine that document which you have, examine it carefully and say whether you read the original of that [73] prior to the time that we are talking about now?

(Testimony of John K. Borg.)

The Court: You might call his attention to any particular part there that you have reference to, Mr. Clements.

Mr. Clements: I will ask one other question.

Q. After reading Exhibit No. 7 now, do you think that you examined those papers at four o'clock on January 14, 1953? A. Yes.

Q. Mr. Alsager came over to you at the Elks Temple, as I understand? A. What was that?

Q. You met Mr. Alsager at the Elks Temple, is that right? A. Yes.

Q. Did he have a law book with him at that time?

A. I don't believe so.

Q. Would you say that he didn't?

A. No, I wouldn't say whether he did or didn't, he may have had.

Q. I understand that you had a conversation with Mr. Alsager about this case out in the lobby?

A. Yes, sir.

Q. And what did he say to you and what did you say to him on that occasion?

A. What did he say to me?

Q. Yes.

A. In his exact words—after I think I gave him the papers, [74] as far as I recall now and he said, "That is a hot potato. Do I have to be there?" And I said, "As far as I know you don't have to be there, I don't know of any reason why I should tell you to be there."

Q. What else was said?

(Testimony of John K. Borg.)

A. That was about all there was to it and then he walked out and he said, "I won't be there."

Q. But he did call you the next morning and said that he would be there at the hearing?

A. What was that?

Q. Didn't he call you at eight o'clock the next morning and tell you that he would be at the hearing?

A. Yes.

Q. Are you sure that he didn't tell you that he would be there, that afternoon?

A. Am I sure of what?

Q. Are you sure that Mr. Alsager didn't tell you on the afternoon of the 14th that he would be at the hearing?

A. Am I sure that he told me that he would not be there?

Q. Yes. A. Yes, sir.

Q. Which did he tell you, that he would be there or that he would not be there, what is your memory of it?

A. On that afternoon?

Q. Yes, when he talked to you? [75]

A. He turned around and said that he would not be there and then he walked out.

Q. Now, have you related all of the conversation that took place between Mr. Alsager and you on the afternoon of January 14th at the Elks Temple at Moscow, Idaho?

A. I think so.

Q. I want to ask you if it is not a fact that at that time and place if you didn't say to Mr. Alsager that he would be a damn fool to go into this case and that if he did he would be committing political

(Testimony of John K. Borg.)

suicide, or words to that, in substance and effect as I have related?

A. I don't recall anything to that effect, I don't recall that he said anything to that effect, no.

Q. I am asking if that is not what you said to him?
A. No, sir.

Q. Would you say that you did not say it to him at that time and place?

A. What was that?

Q. Would you say that you did not say those words, in substance and effect, to him at that time and place?

A. I would say positively that I did not say those words.

Q. Was Mr. Maury O'Donnell's name mentioned in that conversation between you and Mr. Alsager in the Elks Club on January 14, 1953?

A. No, sir. [76]

Q. I will ask you if that time you did not also say to Mr. Alsager that Maury O'Donnell never did show up at a preliminary hearing and there was nothing in the law that a Justice of the Peace was required to know about the law, did you make that statement to Mr. Alsager or words in substance to that effect?
A. No, sir.

Q. Do you recall now whether Mr. Alsager had with him a copy, during that conversation?

A. Did Mr. Alsager have the Code?

Q. Yes.

A. I would say that he didn't although I would not state positively that he didn't.

(Testimony of John K. Borg.)

Q. What were you doing down town on the morning of January 15, around 8:30 o'clock.

A. So far as I remember I don't know whether I was down town or not.

Q. Do you remember walking past Clarence Johnson's Barber Shop—you know where that barber shop is, don't you? A. Yes, I do.

Q. Do you remember walking past that barber shop, the barber shop of Clarence Johnson around 8:30 that morning, going in a westerly direction?

A. I don't recall but I wouldn't say that I didn't, but I just don't recall. [77]

Q. You would deny that you walked past Clarence Johnson's Barber Shop around 8:30 o'clock that morning? A. Me deny it?

Q. Yes, you would not deny that, would you?

A. No, sir, I would not deny it.

Q. Will you state whether or not you were down town in Moscow that morning, after Mr. Alsager had called you and before you went back up to the courthouse?

A. I am almost positive that I wasn't down town.

Q. Do you have an automobile or were you driving an automobile at that time? A. Yes.

Q. Can you definitely recall whether you were or were not down town before you went to the courthouse that morning?

A. As far as I recall I wasn't. As far as driving a car I don't think that I did.

(Testimony of John K. Borg.)

Q. Do you recall riding up to the courthouse that morning with any other person?

A. No, I don't.

Q. Will you say that you didn't ride up in an automobile, to the courthouse, with any other person, that morning, from any place down town up to the courthouse?

A. I say that I don't remember, no, I don't remember that I did and I am quite sure that I didn't.

Q. What time did you arrive in the district courtroom on the [78] morning of January 15?

A. The case was set at nine o'clock and I think that I was up there five or ten minutes prior to that.

The Court: I have naturalization hearings set at 11:00 o'clock and it is necessary for me to have them at that time, so I will recess this trial now for 15 minutes. We will be in recess for 15 minutes on this trial and the jury may retire if they desire, however, they need not leave the courtroom during the hearing on naturalization.

April 6, 1954, 11:15 A.M.

Q. Referring to the morning of January 15, 1953, Mr. Borg, at the Courthouse, what time did you arrive at the Courthouse that morning?

A. Approximately five or ten minutes before nine.

Q. What arrangement did you make with the officials up there to hold this preliminary hearing?

A. I didn't make any arrangement.

(Testimony of John K. Borg.)

Q. Did you have any contact with Judge McQuade about using the courtroom that morning for this hearing? A. No, sir.

Q. Did you contact the janitor or Mrs. Babcock about using the courtroom that morning? [79]

A. No, sir.

Q. Do you recall whether Judge McQuade's chambers were locked that morning?

A. What was that?

Q. Do you know where Judge McQuade's chambers are located, you know that he has an office back of the bench? A. Yes.

Q. You have been in that room? A. Yes.

Q. Do you know whether those doors were locked that morning? A. I would not know.

Q. Did you see Judge Martinson while you were there that morning, up at the Court House?

A. You ask if I saw him?

Q. Yes. A. No, sir.

Q. Who arrived or who was present in the district courtroom at the time you entered it?

A. I don't recall, but I believe that Mr. Estes and Mr. Felton were there and a few more people. Whether they were there when I came in or not, I wouldn't know now, I can't say.

Q. Who do you recall as being present besides Mr. Estes and Mr. Felton?

A. Who was there?

Q. Yes, who do you recall as being present in the courtroom [80] besides Mr. Estes and Mr. Felton?

(Testimony of John K. Borg.)

A. I wasn't paying too much attention but I know that the Idahonian reporter was there.

Q. Do you recall his name?

A. No, I don't.

Q. He called you up that morning, about 8:00 o'clock, to ask you where you were going to have this hearing, didn't he?

A. Where we were going to have it?

Q. Yes.

A. He called sometime, either that morning or the night before.

Q. As a matter of fact, that was just about the time that you had the call—first, let me ask you, did he ask you where you were going to hold the hearing? A. Yes.

Q. And that was about the time that you had the call from Mr. Alsager, was it not?

A. Yes, I imagine that it was.

Q. Where did you tell the newspaper reporter that you were going to hold this hearing?

A. I told him that it would be held in the courtroom at the Courthouse.

Q. What position did you occupy in the courtroom? Did you sit on the judge's bench or the chair behind the bench? A. No, sir.

Q. Do you recall anybody else being with Mr. Estes and Mr. [81] Felton in the courtroom?

A. With them?

Q. Yes. A. No, I don't think that I do.

Q. Do you know Mr. Estes' secretary, Mrs. Marjorie Moore? A. Yes, I know her.

(Testimony of John K. Borg.)

Q. Was she there that morning?

A. It seems to me that she was; I am quite sure that she was there.

Q. Do you recall seeing and hearing Mr. Felton having a conversation with the newspaper reporter, Mr. Casen, about the time?

A. No, I didn't hear him have any conversation with him.

Q. Did you hear Mr. Felton ask Mr. Casen to check his watch with the court's clock?

A. Did I hear that question?

Q. Yes. A. No, sir, I didn't hear it.

Q. Did you see Mr. Felton at any time prior to the time that he moved this dismissal, looking at his wrist watch or at the court's clock?

A. No, sir.

Q. Did you hear him make the statement that it was now 9:07 and in view of the prosecuting attorney failing to appear with his witness that he moved a dismissal of it? [82]

A. No, I don't think I did.

Q. How far would Mr. Felton and Mr. Estes be sitting from you at the time that you convened your hearing there?

A. Well, it would be approximately about where the last chair in the jury section is, where that lady is sitting (indicating).

Q. And were you as hard hearing then as you are now? A. Not quite.

Q. Are you or were you acquainted, at that time, with the deputy sheriff of Latah County named E.

(Testimony of John K. Borg.)

D. Hill? A. If I was acquainted with him?

Q. Yes, were you acquainted with him at that time? A. I imagine I was.

Q. Do you recall meeting him when you came down from the courtroom that morning?

A. I don't, no.

Q. Would you say that you did not meet Mr. Hill at some place in the Courthouse or immediately back of the Courthouse after you adjourned your hearing that morning?

A. No, I don't recollect meeting him.

Q. Would you say that you did not meet him?

A. No, I said that I didn't know.

Q. To refresh your recollection, don't you remember meeting Mr. Hill after you had adjourned your hearing and he told [83] you that they had telephoned from the Police Station and that Mr. Alsager and his witness were at the Police Station and they wanted you to come down?

A. No, the first I knew of it was——

Q. Just a minute, just answer my question. Would you say that Mr. Hill did not tell you that that morning—how do you want your answer—that he didn't tell you or that you don't recollect?

A. Whether I saw Mr. Hill?

Q. Yes.

A. I am quite sure that I didn't see him.

Q. You did go to the Police Station immediately after the hearing? A. What was that?

Q. You did go to the Police Station immediately after the hearing at the Courthouse, didn't you?

(Testimony of John K. Borg.)

A. Yes.

Q. How did you go down there? How did you get from the Courthouse back to the Police Station?

A. I imagine that I walked down there, as far as I know.

Q. Do you know of a lady named Mrs. Peggy David? A. What?

Q. Do you know Peggy David?

A. Yes, she was the clerk in the Police Department, is that the one that you mean? [84]

Q. Yes. A. Yes, I know her.

Q. Did you see her at the Police Station when you went down there that morning?

A. I saw her, yes.

Q. When you got to the Police Station, were there many people there?

A. Yes, quite a bunch there.

Q. Did you have any conversation with Mr. Alsager that time? A. Yes.

Q. Will you tell us what you said to him and what he said to you?

A. He asked me something about what was done or something to that effect and I told him that as far as the case was concerned it was dismissed.

Q. As a matter of fact, when you first went there didn't Mr. Alsager say to you, "Judge, will you step aside here, I want to talk to you about how we will handle this case?"

A. I don't think so because the very first thing

(Testimony of John K. Borg.)

that happened was that I told him that the case had been dismissed.

Q. Don't you recall Mr. Alsager requested you to step aside to discuss the case with him and you said, "There is no case because I have dismissed it, you didn't show up at the Courthouse"?

A. The thing I remember for sure is when I said that the [85] case was dismissed he said, "You can't do that."

Q. What else did he say that you can recall?

A. As far as I can recollect there wasn't much more said.

Q. Don't you remember him saying at that time that if that was the way you were going to conduct the business for the State of Idaho that you could never expect him to bring any more state business into your court?

A. No, sir; I don't recollect that he did.

Q. When did you arrive back at the Police Station that morning?

A. When?

Q. Yes; about what time would you say that you arrived back at the Police Station on the morning of January 15?

A. Well, I was in the Assessor's Office when I got the call.

Q. What call?

A. It was a call from Mr. Alsager at the Police Station.

Q. On the morning of January 15?

A. Yes.

Q. And what was that conversation?

(Testimony of John K. Borg.)

A. It wasn't very long after the case was over, it was possibly 20 or 25 minutes after nine.

Q. You say that after the case was over Mr. Alsager got you on the telephone at the Assessor's Office?

A. Yes.

Q. What did Mr. Alsager say to you at that [86] time?

A. Well, he wanted to know why I didn't appear or something to that effect.

Q. Now, just reflect back and tell us the best you can, to the best of your recollection, what Mr. Alsager said to you at that time and what you said to him in this telephone conversation that you refer to?

A. Well, the sum and substance of it was that he wanted to know why I didn't come down there.

Q. Now, are you positive that you had a telephone conversation with Mr. Alsager at the time and the place that you refer to?

A. Yes, sir.

Q. And you don't recall any conversation about that time with the deputy sheriff, Mr. Hill?

A. No, sir; he may have been the one that told me that there was a telephone call for me but I cannot say as to that.

Q. You say that Hill may have been the one that told you there was a call for you?

A. It could have been, yes.

Q. Is it not possible that Mr. Hill was the one that told you to go down to the Police Station, that Mr. Alsager and his witnesses were waiting there, instead of Mr. Alsager telephoning to you?

(Testimony of John K. Borg.)

A. No; the first I knew of it was over the telephone.

Q. How long did you stay in the Police Station after you [87] got back down there?

A. After I got down there?

Q. Yes.

A. Not very long; I don't think it was over five minutes.

Q. Did you discuss at that time with Mr. Alsager any possible procedure to correct the thing that you had done that morning when you knew that he was there and had his witnesses?

A. No, sir.

Q. You just took the position that you had dismissed the case and that was the end of it, is that correct?

A. Yes; there was nothing said about anything else.

Q. Did you inquire of him as to how you got mixed up on the place and what you could do about the case?

A. I don't believe there was anything said about it.

Q. After you left the Police Station, during the rest of the day, there was a considerable amount of talk around town about the case being dismissed?

A. Yes.

Q. In fact there was a great amount of talk, wasn't there?

A. There was quite a bit. I don't know whether it all got to my attention or not.

Q. You were conscious of the fact that you were

(Testimony of John K. Borg.)

being severely criticized for dismissing the case, even in that early afternoon? [88]

Mr. Tonkoff: That is objected to as calling for a conclusion of the witness and it is outside of the direct examination.

The Court: He may answer.

A. Yes.

Q. Do you recall, Mr. Borg, reading the newspaper articles in the Spokesman Review on the morning of January 16, 1953, about your dismissal of this case?

A. There were several articles; as far as the dates, I can't say.

Q. Well, shortly after you dismissed this case, within a day or two were hearing public rumors of criticism of your action, were you not?

A. A day or two later there was an article in the Spokesman Review.

Q. And you wrote a letter to the Spokesman Review about that article, did you not?

A. Yes, sir; I did.

Q. And you sent a copy of that letter to the Daily Idahonian, didn't you? A. Yes, sir.

Q. Mr. Borg, handing you what has been marked for identification as Defendant's Exhibit No. 8, I will ask you if that is not a copy of a letter that you left with the Daily Idahonian, [89] the original of which you sent to the Spokesman Review?

A. Yes, sir.

Q. You better read that, Mr. Borg, to make sure

(Testimony of John K. Borg.)

of it. You recognize that as being written on your typewriter? A. Yes, sir.

Mr. Clements: I now offer in evidence Exhibit No. 8, which has been marked for identification, as a part of the cross-examination of this witness.

Mr. Tonkoff: I have no objection.

The Court: It may be admitted.

Mr. Clements: May I read the exhibit now to the jury?

The Court: Yes, you may.

Mr. Clements: This is a letter dated January 16, 1953: "Editor, Spokesman Review: In your paper this morning you had an article regarding a case in my court, that of the State of Idaho vs. Murray Estes. In the heading of the article you state that the case was scrapped and that the justice changed courtrooms, leaving the impression making use of the courtroom at the Courthouse instead of the Police Station was a deliberate move to hamper justice to be done.

"At this juncture I would like to inject the following: The newspapers are all and at all times clamoring for free press, but they are prone to [90] forget that in accepting that privilege they are also accepting a responsibility, that of printing all the news, and if I had been interviewed by your scribe I could have assisted considerably in getting this straight.

"This is the fact: In the first place, from what I know about Mr. Estes I do not think he is the kind of man that took a gun around town without a

(Testimony of John K. Borg.)

reason and, furthermore, I do not think there is a man, woman or child in the town of Moscow that is afraid to go about their business or pleasures for fear of being molested by Mr. Estes. Now, then, this being the case, I thought perhaps erroneously, but certainly with reason, that the complainant had changed his mind and had decided to drop the case by staying away, which had been done many times in my eighteen years as a Justice of the Peace. As to changing the place for holding the hearing, there was no change, which I could have told your scribe had he taken the bother to see me.

“On all my important cases, where the attendance would supposedly be large, I have held them at the Courthouse, rather than at the small room in the Police Station.

“Just why the Prosecuting Attorney, Mr. Alsager, and myself did not get together on the place for holding the hearing, I do not know. Neglect on the part of both of us perhaps.

“Several persons called up to find out where [91] the hearing was to be, including the Idahonian correspondent, and I told them all that it would be held in the courtroom at the Courthouse.

“Lastly; I certainly wish you would use a little more care in your everlasting search for sensational headlines and headings. John K. Borg, 616 East 7th, Moscow, Idaho, Justice of the Peace.”

Q. Now, Mr. Borg, you say that immediately after you dismissed this case you became conscious of a lot of criticism existing?

(Testimony of John K. Borg.)

A. What was that question?

Q. You referred to the fact that immediately after you dismissed this case on January the 15th you became conscious that there was a lot of talk and criticism against you? A. Yes.

Q. Did that criticism and what you were conscious of continue up to May 13?

A. For a considerable length of time.

Q. You recall when the newspaper articles were published, don't you? A. What was that?

Q. You recall the dates when the newspaper articles were published? A. What date?

Q. Yes, is that date in your mind now? [92]

A. No, sir.

Q. Assuming that the newspaper articles came out, the articles that are the subject of this lawsuit, one in the Daily Idahonian and one in the Morning Lewiston Tribune on May 13, 1953—assuming that was the date, did that criticism and public talk continue up to the date that these articles were published? A. Yes, sir.

Mr. Clements: That is all.

Redirect Examination

By Mr. Tonkoff:

Q. Judge Borg, you make the statement in this letter that you have been a Justice of the Peace for 18 years; had you served as a Justice of the Peace anywhere else? A. Yes, sir.

Q. Would you tell the jury where that was?

(Testimony of John K. Borg.)

Mr. Clements: We object to that as being immaterial. A. Westby, Montana.

The Court: The answer is in the record and it may stand.

Q. Any place else? A. No, sir.

Q. How long did you serve at Westby, Montana? [93]

A. Approximately eight years or some such matter.

Q. Were you ever a Justice of the Peace in North Dakota? A. No, sir.

Q. Judge, you also make a statement in this letter that there has been other occasions when the complaining witness did not appear at a hearing, what did you do in those instances, in the case where the witness, the complaining witness did not appear?

A. If there was a preliminary hearing?

Q. Yes.

A. The case would be transferred to the district court.

Q. Judge Borg, I said in cases where you said that in 18 years a lot of the complaining witnesses did not appear or didn't want to press the charge, now in cases where the complaining witness did not appear at a preliminary hearing what did you do, what is the order you would make and what is the procedure?

Mr. Clements: We will object to that, if the Court please. I don't think that it states the facts correctly, that there have been many cases in 18 years.

(Testimony of John K. Borg.)

Mr. Tonkoff: That is what he says in this letter, and it is the defendant's exhibit and I think that I should be allowed to examine from it.

The Court: I will let you go ahead. [94] I think the jury can weigh the matter.

Q. Did you understand my question, Judge Borg?

A. Not exactly.

Q. When a complaining witness does not appear at a preliminary hearing what do you do when you are sitting as judge?

A. The case is dismissed.

Q. Is that what you did in this instance?

A. Yes.

Q. Is that the procedure that you follow?

A. Yes.

Q. How many people were at the Police Station?

A. When?

Q. When you arrived at the Police Station?

A. After this hearing?

Q. Yes.

A. I don't know, there was a lot of people there.

Q. Where were you when the Idahonian Reporter called you? A. At home.

Q. And where were you when Mr. Alsager called you?

A. I am sure it was in the Assessor's Office at the Court House, it was in one of those offices there.

Q. Did you see Mr. Estes before you went to the courtroom at the Courthouse? A. No. [95]

Q. Where did you first see him that morning?

(Testimony of John K. Borg.)

A. The first time I saw him was at the courtroom on the morning of the 15th.

Q. In all your experience as a Justice of the Peace did you ever call the sheriff or the prosecuting attorney to appear before you at a preliminary hearing? A. No, sir, I never did.

Q. A preliminary hearing?

A. I never did.

Q. Do you know of any practice or procedure where the Justice calls the sheriff or the prosecuting attorney to appear at a hearing scheduled before the Court?

Mr. Clements: We object to that as incompetent, irrelevant and immaterial and not proper redirect examination. .

The Court: The objection is well taken, it is well understood what the Court is supposed to do when a case comes up.

Mr. Tonkoff: Counsel inquired of this witness whether he had called the sheriff or Mr. Alsager or anyone else.

The Court: Yes, and that is all there is to it, he said that he didn't.

Q. When did you first become acquainted with Mr. Alsager?

A. I think I met him while he was going to school. [96]

Q. What was the situation of the hearing that you had at the Police Court, what kind of a case was that?

A. Well, that was—do you mean whether it was a civil or a criminal case?

(Testimony of John K. Borg.)

Q. Well, I don't know. Mr. Clements inquired of you if you ever held a hearing at which Mr. Alsager was present at the Police Court, and I am asking, what kind of a case was that?

A. I remember distinctly that it was a civil case.

Q. Was that related or was that anything like a preliminary hearing where the defendant is charged with a felony? A. Was it what?

Q. Was that case similar to a preliminary hearing where the defendant is charged with a felony?

A. It would be similar, yes.

Q. Well, did you ever hold your preliminary hearings at the Police Station?

A. The distinction there is quite varied and complicated.

The Court: I don't think he got your question, Mr. Tonkoff.

Mr. Tonkoff: I don't believe that he did.

Q. What I asked you, Judge, was, did you ever hold a preliminary hearing at the Police Station?

A. I don't think I had any State cases with preliminary hearings, at least, I know when things like that came up [97] during Maury O'Donnell's term as prosecuting attorney he always kept me informed and we got together on everything.

Q. When did you decide to leave the State of Idaho and go into Washington?

Mr. Greene: I think that is improper redirect examination, Your Honor.

Mr. Tonkoff: It is preliminary, Your Honor.

(Testimony of John K. Borg.)

The Court: I believe you examined him on that one time, but I will let you do it again.

Mr. Tonkoff: I will reframe that and ask this question.

Q. What caused you or what made you come to the conclusion to move from here to the State of Washington?

Mr. Clements: We object to that as calling for a conclusion of the witness, and calls for a self-serving declaration; he may state the facts.

Mr. Tonkoff: The purpose of this, I wonder if the Court wants to hear from me.

The Court: I will hear what you have to say, Mr. Tonkoff.

Mr. Tonkoff: The purpose of this is, the Court will recall that Mr. Clements asked if he heard reports or complaints concerning the action in dismissing the case, that is, if he heard those reports and complaints up to [98] May 13, I believe that was the question. I am inquiring now as to the cause of his leaving——

The Court: ——Of course, the reason I feel that it is not admissible is that the first publication was in January of that year, and this publication wasn't brought up until May 13. He has already testified that he read the article in the *Spokesman Review* in January, and testified that long prior to this publication the same criticism was being made of him orally, so I don't think that I should admit this question because you can hardly pin it on these newspapers and this publication because it was

(Testimony of John K. Borg.)

going on since January, long prior to this publication.

Mr. Tonkoff: That is true, Your Honor, but I offered the articles yesterday, and Your Honor held that they were not libelous and this article is in itself libelous.

The Court: You didn't offer the Spokesman Review article in evidence, as I remember it, and that was a matter of public distribution here in the community. I will have to sustain the objection. there is no use of us arguing about it.

Mr. Tonkoff: No, that is right, and I did not intend to argue with the Court. I will take an exception to the ruling of the Court—— [99]

The Court: ——You understand very well that you have an exception to every ruling this Court makes and you don't need to imply to this jury that you need to except to any rulings because you know that you don't have to except here. If this Court makes any mistake at all during the trial of this case, of course, it is ground for appeal.

Mr. Tonkoff: I apologize, Your Honor, sincerely, I didn't mean it that way.

The Court: Yes, I know—you are a very good lawyer, Mr. Tonkoff. and you don't need to take any exception here.

Mr. Tonkoff: That is all, Judge Borg.

(Testimony of John K. Borg.)

Recross-Examination

By Mr. Clements:

Q. Did I understand you to say, Mr. Borg, in your last examination by Mr. Tonkoff, that you had never held a preliminary examination in the Police Court?

A. It is a little hard to determine because it is quite different as to what constitutes a preliminary hearing. I suppose any case where the defendant pleads not guilty it would perhaps be a preliminary hearing, and if that is the case I have certainly had some of those in the courthouse and at the Police Station. [100]

Q. Mr. Borg, you presided over a preliminary hearing on the 21st of January, 1953, when Mr. Murray Estes was again before you on a charge of assault with a deadly weapon, didn't you?

A. Yes, sir.

Q. And that hearing was started and all of your subpoenas were issued for all of the witnesses to appear at the Police Station, is that right?

A. I don't think so—for that first hearing on the 15th?

Q. No, the second hearing on the 21st?

A. Yes, sir.

Q. And you began that preliminary hearing there and on account of so many people being present you moved it to the district court, didn't you?

A. Yes, sir.

Mr. Clements: That's all.

(Testimony of John K. Borg.)

Mr. Tonkoff: That's all, Judge Borg.

The Court: You may step down.

Mr. Tonkoff: I will call Laurence Huff.

LAURENCE HUFF

called as a witness by the plaintiff, after first being duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Your name is Laurence Huff? [101]

A. Yes, sir, Laurence E. Huff.

Q. What is your profession?

A. I am an attorney-at-law.

Q. Where have you practiced?

A. Moscow, Idaho.

Q. And when were you first admitted?

A. June of 1922.

Q. And where have you been practicing all of those years, Mr. Huff? A. Here at Moscow.

Q. And are you familiar with the procedures in Moscow and with the various places where hearings are held?

A. I am familiar with the proceedings in the State of Idaho.

Q. And with the practice in this county?

A. Yes.

Q. Where have preliminary hearings heretofore been held?

A. In my experience they have been held in the district courtrooms of the County District Court.

(Testimony of Laurence Huff.)

Q. And that is how far from the Police Station?

A. Well, if you go straight up the hill it would be four blocks, but the way you have to go it is about six blocks.

Q. They are two separate buildings, are they?

A. Yes, two separate buildings.

Q. Mr. Huff, did you have a conversation with Mr. Alsager concerning whether he would appear at a hearing which was [102] brought before Judge Martinson and later transferred to Judge Borg?

Mr. Greene: Now, I object to that as calling for hearsay and made out of the presence of these defendants.

The Court: Yes, this testimony might be admissible if Mr. Alsager takes the stand but it is not admissible at this time.

Q. Did you have anything to do with the preparation of the dismissal of the case of the State of Idaho against Estes that was to be held on the 15th of January, before Judge Martinson?

A. I did.

Q. Would you state under what circumstances that dismissal was prepared?

Mr. Greene: Again I object, your Honor, it is calling for hearsay and made outside of the presence of the defendants.

The Court: The record has been introduced here in evidence and I think the record is the best evidence.

Mr. Tonkoff: Your Honor, there is another part of that record that is not in the record.

(Testimony of Laurence Huff.)

Mr. Clements: I think, if I may be permitted to interrupt here, that this is a subject [103] that should not be gone into in the presence of the jury.

Mr. Tonkoff: I think counsel is right, your Honor.

Q. Mr. Huff, have you ever attended a preliminary hearing such as the one we have been discussing here in connection with the case against Mr. Estes, at the Police Station?

Mr. Greene: Now, I object to that as being immaterial, your Honor.

The Court: The objection is sustained.

Q. You are familiar with preliminary hearings, are you not, as a practicing attorney?

A. Yes, sir.

Q. And would you state what the procedure is when a complaining witness does not appear at a preliminary hearing?

Mr. Greene: We object to that, your Honor, as calling for a conclusion of a witness on a matter of law and it invades the province of the Court and jury.

The Court: The objection will be sustained.

Q. Mr. Huff, does the prosecutor appear at all preliminary hearings?

Mr. Greene: We object to that, if the Court please, as being immaterial and not tending to prove or disprove any issue in this case.

The Court: He didn't appear at this [104] one.

Mr. Tonkoff: I am trying to find out what the

(Testimony of Laurence Huff.)

procedure is and I think he is an expert and should be allowed to answer the question, I don't know what your Honor's ruling is on the matter. That is the purpose of the question, to find out what the practice is, I think it is quite important.

The Court: I can tell you what the practice is, the prosecuting attorney has to be at a preliminary hearing if one is held or have his assistant there. He don't need to testify to that.

Mr. Tonkoff: I would like to cite you the statute on that.

The Court: I will let him answer, I know what it is.

Q. Is there a statute in that respect concerning the appearance of the prosecuting attorney at a preliminary hearing?

A. I find myself in a very embarrassing position and I am very reluctant to answer in view of the statement of his Honor.

The Court: I am supposed to know the law and I will instruct this jury as to what the law is, but I will let you testify this one time as to what the law is, Mr. Huff, however, it is the province of the Court to instruct the jury as to what the law [105] is.

A. Without the statute before me I would be reluctant to testify positively but it is my understanding that the prosecutor did not appear unless called in by the Justice of the Peace.

Q. Unless he is called in?

(Testimony of Laurence Huff.)

A. Unless he is called in by the Justice of the Peace.

Q. Do you remember the section of that statute, Mr. Huff?

A. I don't remember the section just now.

Q. About what is the size of the police courtroom at the Police Station?

A. I should say about twice the size of the dais upon which the jury is sitting.

Q. What furniture was in it at that time?

A. There was two tables and three or four chairs.

Mr. Tonkoff: I will dispense with any further examination and I may call you back, Mr. Huff. Your witness.

Cross-Examination

By Mr. Greene:

Q. Mr. Huff, you were Mr. Estes' attorney in defending the charges brought against him by Mr. Shoup?

A. I will have to qualify that to a certain extent, Mr. Greene, my first appearance and I don't want to use the word appearance in the legal sense. My first activity would [106] be more in my situation as being the oldest member of the bar of Latah County in a point of both age and years of service.

Mr. Greene: I am going to ask that answer be stricken as not being responsive to the question.

The Court: It may be stricken.

Q. I wonder now if you will answer my question. Did you or did you not defend Mr. Estes on

(Testimony of Laurence Huff.)

at least one of the cases brought against him by Mr. Shoup?

A. I later appeared as his attorney officially of record.

Mr. Greene: That is all.

Redirect Examination

By Mr. Tonkoff:

Q. Were you with Mr. Estes on the morning of the 15th, Mr. Huff?

A. Will you please state what time in the morning?

Q. At eight o'clock, from eight o'clock on or prior to eight o'clock, a.m.?

A. From eight o'clock on or maybe a fraction before that I was in the office of Estes and Felton continuously until sometime about a quarter to nine except for a matter of four or five minutes, whatever time it would take to walk across the street and walk upstairs to Mr. Alsager's office and back down. I was at the office of Estes and [107] Felton during that time.

Q. And during the time that you were in that office did you see Judge Borg?

A. No, he was not there.

Q. In the office or about the premises?

A. I didn't see him at any time during that time or while I was outside.

Q. Did you accompany Mr. Estes and Mr. Felton to the Courthouse?

A. No, I did not.

(Testimony of Laurence Huff.)

Mr. Tonkoff: That is all for the present, Mr. Huff, as I said before, I may call you back.

Mr. Greene: I have nothing further.

Mr. Clements: I have no questions.

The Court: You may step down.

Mr. Tonkoff: I will call Mr. O'Donnell.

J. M. O'DONNELL

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Your name is James O'Donnell?

A. J. M. O'Donnell. [108]

Q. And what is your profession, Mr. O'Donnell?

A. Attorney-at-law.

Q. How long have you practiced?

A. Since 1938; I was admitted in 1936.

Q. Where have you been practicing during that time?

Q. In the general practice at Moscow, Idaho.

Q. Have you held any public office?

A. Yes; prosecuting attorney of this county.

Q. When were you the prosecuting attorney?

A. From the first week in 1943 until the first week in January in 1953.

Q. And that was for Latah County?

A. Yes, sir.

Q. During the time you were prosecuting attorney you held preliminary hearings—you are

(Testimony of J. M. O'Donnell.)

familiar with this preliminary hearing that we have been discussing here, are you? A. Yes, I am.

Q. And had you held that type of hearing in the ten years that you were prosecuting attorney?

A. Yes, sir.

Q. How many would you say?

A. About five or six a year.

Q. And where were they held?

A. Nearly all in the Courthouse of Latah County, Idaho, here [109] in Moscow.

Q. You say nearly all; were some held elsewhere?

A. During the ten years' time I wouldn't be able to say absolutely that there were none held any other place—I do know of one instance where the hearing was held at another place.

Q. And where was that?

A. At the Moscow, Idaho, Police Station, in Moscow.

Q. Were there any special arrangement or reason for holding it there?

A. That particular case was held before a man by the name of Kent Power who was a law student at the University of Idaho who was a Justice of the Peace in Latah County, Idaho, and qualified to hear State cases and was also appointed and retained by the City of Moscow to act as Police Judge and hear city cases. He held court at a certain hour every day for the city and we knew that it was convenient to catch him there for Justice of the Peace work.

(Testimony of J. M. O'Donnell.)

The particular case that was held there that I recall was a case in which the defense attorney stated that he didn't want a transcript and the only witness that I intended to introduce in the State's case was a police officer whom I also knew would be at the Police Station. [110]

Q. Was there any defense attorney in that case?

A. Yes, there was.

Q. What is the size of that Police Courtroom where you held that hearing, that meeting at the Police Court or Police Station?

A. It's very small; it would not be any larger and possibly not as large as that described by Mr. Huff. It is not very large, but I guess maybe it would be twice as large as the dais upon which the jury is sitting.

Q. Is there any furniture in it?

A. Yes; there was a desk right behind which there was a chair for the Justice of the Peace and there was another desk on the opposite side of the room where there was a chair for a police officer and probably four other chairs.

Q. Is there ample room for a reporter to attend there, particularly if there are several witnesses?

A. Oh, there is room for a reporter to sit and write.

Q. And you say that in all of your ten years of experience that is the only time you know of where a case was held outside of the courtroom?

A. That is the only one that I can particularly recall.

(Testimony of J. M. O'Donnell.)

Mr. Tonkoff: That is all; your witness. [111]

Cross-Examination

By Mr. Greene:

Q. Who was the defense attorney in the particular case where the hearing was held at the Police Station? A. Melvin Alsager.

Q. That is the now Prosecuting Attorney of Latah County? A. Yes, sir.

Q. When did you say that you first became Prosecuting Attorney?

A. The first week in January of 1943.

Q. Can you give us any idea as to how many preliminary hearings were held that year that you attended? A. No, I couldn't.

Q. Can you give us any idea as to whether any of those were held at the Police Station?

A. No, I could not, positively.

Q. And if I asked you the same question for each of these succeeding years, would your answer be the same? A. Yes, it would have to be.

Q. Have you ever made any effort to determine from the records how many preliminary hearings were held at the Police Station and how many were held at the district courtroom?

A. No, sir, I haven't.

Q. Do you recall holding a preliminary hearing in your own office, Mr. O'Donnell?

A. I don't recall but I would not deny that it had been done [112] in the ten years time.

(Testimony of J. M. O'Donnell.)

Mr. Greene: That's all.

Mr. Tonkoff: That's all, Mr. O'Donnell.

The Court: We will recess at this time until 2:00 o'clock this afternoon.

April 6, 1954, 2:00 P.M.

R. J. TUNNICLIFF

called as a witness by the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Your name is R. J. Tunncliff?

A. Yes, sir.

Q. And you are hear under subpoena?

A. Yes, sir; in fact, three of them.

Q. What is your occupation or profession?

A. I am the official court reporter for the second judicial district.

Q. And that is for Moscow and the surrounding Country? A. Yes, sir.

Q. And have you been reporting here in the City of Moscow for some time?

A. Yes; that is outside of my job, however. [113]

Q. Your official job is what?

A. Official reporter for the second district and that is Latah and Clearwater Counties.

Q. Where is your office?

A. In the Courthouse in Moscow, Idaho.

Q. How long have you been working in that posi-

(Testimony of R. J. Tunnicliff.)

tion? A. Since September of 1942.

Q. During that time have you had occasion to report any preliminary hearings? A. I have.

Q. Has anyone else reported them besides yourself, that you know of?

A. Not to my knowledge.

Q. During that time where have the preliminary hearings taken place?

A. Up until February 11, 1954, in the district courtroom in the Courthouse in Moscow.

Q. Those are preliminary hearings for Latah County? A. Latah County, yes, sir.

Q. And have you reported any preliminary hearings any place other than at the courtroom?

A. No.

Mr. Tonkoff: That is all; your witness. [114]

Cross-Examination

By Mr. Greene:

Q. Mr. Tunnicliff, your using the courtroom in the Courthouse here in Moscow was a matter of convenience for you with your office there in the Courthouse? A. Not as I understood it.

Q. Do you know of any particular reason why they were held at the courtroom?

A. Yes, sir; two reasons.

Q. What were they?

A. One is that the City Hall or Police Station is only used by the Police Judge in that capacity rather than as Justice of the Peace, in other words.

(Testimony of R. J. Tunnicliff.)

the Justices of the Peace of the County do not use the City Hall, only the Police Judge. The other reason is that it is very inconvenient in that small room to hold a hearing, in fact, it is impossible to hold a hearing.

Q. I think the second judicial district takes in Clearwater County? A. Yes, sir.

Q. Do you attend the sessions of the district court in Clearwater County? A. Yes, I do.

Q. And who takes the preliminary hearings, if any come up, when you are away? [115]

A. That I don't know, if any come up.

Q. On January 15, 1953, where were you?

A. I think I was out of town. I think in Orofino.

Q. Do you know how long you had been there that time?

A. That sounds like the regular motion day, the first and third Friday of the month.

Q. Then you were not available in Moscow for the purpose of reporting a preliminary hearing on that day? A. I was not.

Q. Do you recall on Monday following the 15th of January, 1953, where you reported a preliminary hearing that started initially at the Police Station and then was moved to the Courthouse?

A. I reported that preliminary hearing but I have no knowledge of being at the Police Station that day.

Q. Then you don't know where that particular case was actually set to be heard originally that day?

A. No, I don't.

(Testimony of R. J. Tunnicliff.)

Q. That was the case of the State of Idaho vs. Murray Estes? A. That is correct.

Mr. Greene: That's all. [116]

Redirect Examination

By Mr. Tonkoff:

Q. While you were at Orofino where did you stay? A. At the Helgeson Hotel.

Q. At that time had you read this article of May 13? A. Yes, I had.

Q. Pardon me, I am confused on that—were you at Orofino about the 15th of May, 1953?

A. The 14th and the 15th.

Q. And where did you stay there?

A. The Helgeson Hotel.

Q. At that time did you hear any discussion concerning the article of May 13, 1953? A. I did.

Mr. Tonkoff: Now, your Honor, in view of the Court's ruling I don't want to ask any further questions on this. That is all.

Mr. Greene: No further questions.

Mr. Tonkoff: At this time, your Honor, we have a deposition to offer.

The Court: Do you want to read it at this time?

Mr. Tonkoff: Yes.

The Court: It may be more convenient for one of you to take the witness stand. Ladies and [117] gentlemen of the jury, you will consider this deposition that is about to be read the same as if the person making the deposition was on the witness

stand testifying. One of the attorneys will act as witness, the other attorney will ask the questions and you will interpret the deposition the same as if the witness was here testifying before you, in person.

The Court: Mr. Clerk, you may show the deposition as published.

The Court: You don't need to read any of the preamble, just give the name of the witness and go right ahead with the questions and answers.

Mr. Clements: I want to make an objection to this deposition and I am conscious that this might be premature. Whether I make it now or at the conclusion of the reading of this deposition, I make it upon the grounds that this deposition and the material contained therein is not binding upon the Tribune Publishing Company for the reason that no reference is made to the Tribune Publishing Company nor is the article of May 13 published by the Tribune Publishing Company identified or mentioned in this deposition.

The Court: If that is true, your objection is well taken. You may proceed.

Mr. Tonkoff: This is the deposition of [118] A. L. Morgan, taken on the third day of April, 1954.

DEPOSITION OF A. L. MORGAN

Q. Your name is A. L. Morgan?

A. Yes, sir.

Q. And where is your residence?

A. Moscow, Idaho.

Q. How long have you lived in Moscow, Mr. Morgan?

A. Since 1897, that's been my residence. Of course, I have had temporary times away to other states but my residence, both as a place to live and my citizenship, has been in Idaho.

Q. How long have you been admitted to the bar in Idaho? A. Since 1898.

Q. During most of that period have you practiced law in Moscow or been associated in the field of law in Moscow? A. Yes.

Q. What official position have you held, if any?

A. Well, I was District Judge here for 12 years.

Q. Between what years?

A. Let me see, I served out four terms. That would be—I was elected in 1938, my term of office would start then in 1939 and——

Q. You left office in 1950?

A. Yes, at the close of 1950. I am sure it was 12 years that I served in office there.

Q. During the period that you were District Judge were your [119] chambers immediately adjacent to the district courtroom in the Courthouse of Latah County? A. Yes.

Mr. Estes: I will not read the next question as it was not answered.

(Deposition of A. L. Morgan.)

Q. As District Judge did you have charge of the district courtroom of Latah County?

A. Yes, sir.

Q. Who was it that gave permission for the use of that courtroom for purposes other than district court trials?

A. Myself, if I was in town. The janitor was permitted to permit any meetings that he desired to if I was away from town.

Q. What is your recollection with regard to any request for the use of that courtroom for any preliminary hearings?

A. Well, I think that as far as I can remember, every felony that got into court while I was in office, the preliminary was held in the courtroom in the Courthouse.

Q. In the period of time that you have practiced law in Moscow and the period of time you were District Judge has there ever, within your knowledge, been a preliminary hearing held at the Polic Station in Moscow? A. Not that I know of.

Q. Did you engage, prior to the time that you were District Judge, in the defense of criminal cases? [120] A. Yes, sir.

Q. During the winter of 1952 and 1953 where were you living?

A. Well, '52 and '3, that would be this last winter and the winter before. Of course, I have been here in the hospital since, I think that it is the latter part of April of last year.

Q. That would be 1953?

(Deposition of A. L. Morgan.)

A. Yes, and during the wintertime I was at my stepson's place in Coeur d'Alene most of the time.

Q. Do you recall during the winter you were in Coeur d'Alene of reading any newspaper accounts regarding a criminal proceeding against Murray Estes?

A. I am not sure that I recall whether I read it all or not, but I know that I read about it and talked to people about it. I was able to get around then. Maybe I read it in the Review, I don't know.

Q. Was that while you were in Coeur d'Alene?

A. Yes.

Q. You say that you entered the hospital here in Moscow in April, 1953?

A. That is the best of my recollection. I intended to find out about it but I am quite sure. The records at the Courthouse would show it—that's the records I make. I think it was the latter part of April in 1953.

Q. And have you been here in the hospital [121] since?

A. All of the time, I haven't been out.

Q. Handing you a publication of the Daily Idahonian bearing the date of Wednesday, May 13, 1953, which has been marked Plaintiff's deposition Exhibit 1, did you have occasion to read an article in that paper which is headlined, "Good Government Association Formed at Public Meeting Called at School"? A. Yes, I did.

Q. When did you read that first, Mr. Morgan?

A. As near as I can recall, I read that the day

(Deposition of A. L. Morgan.)

it was published. Now, once in a while we had a little trouble about the boy getting around, but I read it right around that time, while I was here in the hospital.

Q. After that publication did you have any occasion to hear discussions concerning that publication? A. Yes, I heard it talked about.

Q. Will you state in your own words the gist of the discussion which you heard?

Mr. Tonkoff: There is an objection there. Do you want to read it, Mr. Greene?

Mr. Greene: No, let it pass.

A. Well, I have heard talk about it by various people since the article appeared. Now, frankly, I couldn't give you the names of all of them. Naturally, I have talked about [122] it. I have talked to Mr. Tunnicliff about it, and I talked to Dr. Loehr, and I have also talked to a number of patients here that were recuperating and walking around and they would drop in here and during the course of conversation that often would come up. I simply couldn't give the names of those people. In fact, some of them I didn't even know.

Q. When were these discussions held, over what period of time, or about what time, as nearly as you can recall?

A. The last one, I guess, was this morning and that was merely a discussion between myself and the doctor as to——

Mr. Greene: Again, before the witness answers, I would like to make the same objection, that this

(Deposition of A. L. Morgan.)

is hearsay and made outside of the presence of any of the defendants and would be immaterial. That question was not answered, your Honor.

The Court: Very well, you may continue with the questions and answers.

Q. Will you state, Mr. Morgan, what the conversation consisted of?

Mr. Greene: Again the same objection. It calls for hearsay and is outside of the presence of any of the defendants and is immaterial, and I would like to add to the objection that it is shown that the conversation was had subsequent, to the filing of this action [123] and therefore it would be immaterial.

The Court: The objection will be sustained. The Court has ruled on that matter heretofore. I don't like to sustain any objection to any statement that Judge Morgan may have made; he is a fine man and a fine judge; nevertheless, I will have to sustain the objection.

Mr. Tonkoff: Now, the next question is in relation to this same matter.

Mr. Estes: And that same matter continues on through to the top of Page 11 of the deposition and I presume there would be the same objection.

Mr. Greene: Yes, that is right.

The Court: And the same ruling.

Mr. Tonkoff: I wonder, your Honor, if the court reporter could write these questions in the record as an offer of proof?

The Court: Yes, the court reporter is authorized

(Deposition of A. L. Morgan.)

to write into the record the questions and they will be considered as an offer of proof by you and the reporter may also show in the record that the offer was denied by the Court.

(Whereupon the following questions were referred to and are at this time copied into the record.)

Q. Was anything said in these discussions concerning John Borg? [124]

The Court: Mr. Tonkoff, would you hand me that deposition so that I might look those over, there may be something that I would want to permit you to ask here.

Mr. Tonkoff: Certainly, it is from Page 8 to Page 10.

(Whereupon, the Court read Pages 8 to 10 of the deposition.)

The Court: I don't see why this would mean anything one way or another. I will let you read it, you may go ahead with the questions I have examined from Pages 8 to 10, inclusive. You may go ahead with all of the testimony there in the deposition.

Mr. Greene: I don't believe that you had finished Page 7.

The Court: I think that is right, you may go ahead with all of the testimony, that would be beginning at Line 17 of Page 7.

Q. Was anything said in these discussions concerning John Borg?

(Deposition of A. L. Morgan.)

A. I don't know whether I exactly understand that question or not, Mr. Estes. I can say this truthfully that his name was mentioned and the fact that he was a Justice of the Peace, but I don't recall anything being said as to [125] his reliability and honesty or anything of that kind, I don't believe it was discussed at all.

Q. Was anything said in these conversations regarding John Borg in connection with the dismissal of the two charges which had been filed against Murray Estes in his Court?

A. What was the question?

(Previous question read to the witness.)

A. Well, again I am not sure that I understand that question. Even this afternoon I was talking to one of the nurses here and she said, "How is it the lawyers all got off. There must be something crooked or wrong about it."

Q. That's what I mean by the question, Judge Morgan, was there any discussion in those conversations as to there being anything crooked in the dismissal of the charges?

A. I think that in a number of cases—I realize that this is rather weak testimony because I cannot point out to you the particular people that I talked to. As I said awhile ago, I talked to a great many about this case that I didn't even know, here in the hospital.

Q. Did you have anything else to add there?

A. No.

(Deposition of A. L. Morgan.)

Q. You referred to one of the nurses remarking that there must have been something crooked in connection with all lawyers getting off. Were similar remarks made in the discussion by other [126] persons?

A. With reference to other people, a number of them did inquire as to just why a lawyer could get away with a matter of that kind or a judge would dismiss a case under the circumstances outlined in that article.

Q. Do you remember any particular conversation with any person concerning Judge Borg's dishonesty in connection with the cases referred to in that article?

A. Well, I don't recall any particular conversation of that kind.

Q. During any of these conversations was there any question raised of John Borg's honesty or good faith in connection with the dismissal of the actions referred to in the article?

A. Could I have that question?

(Question repeated.)

A. Yes, I think there was. I am quite sure that at that time a number of people have questioned me about that. In other words, more as a matter of curiosity to find out—they maybe thought that having been a judge once I knew how easy it was to get took for a ride. I don't know but they did come in here and ask as to just what Borg, Judge Borg, had in mind in taking the action that he did.

(Deposition of A. L. Morgan.)

Q. You say that you have been practicing here and been judge for a period of years since 1898?

A. I was admitted to the bar at the October term at Lewiston [127] in 1898.

Q. The same system of criminal jurisprudence is in effect that has been in effect all of those years, has it not?

A. Well, for a majority of the time. If you will remember, I could be mistaken about this, there was some change of jurisdiction and some different arrangement about justices of the peace some years after I commenced to practice law, and I think I participated in one or two as a practitioner.

Q. You are familiar with the procedure of getting felony cases into District Court?

A. Oh, yes.

Q. Is it proper practice, in your opinion, for a Justice of the Peace to dismiss an action pending in his court when the State fails to appear at the time fixed for preliminary hearing?

Mr. Greene: I am going to object to that, your Honor, on the ground that it calls for a conclusion of the witness and invades the province of the Court and jury in this proceeding.

The Court: The objection will be sustained. I want you gentlemen to understand that I have admitted all of this testimony over your objection.

Q. Upon motion of the defense for dismissal when the State has failed to appear at the time fixed for preliminary hearing, in your opinion there

(Deposition of A. L. Morgan.)

would be nothing for the [128] Justice of the Peace to do but dismiss the action?

Mr. Greene: Again I object to that as being immaterial, calling for a conclusion of the witness and invades the province of the Court and jury.

The Court: Yes, I will instruct the jury on that matter later.

Mr. Tonkoff: Then that is all; you may cross-examine.

Mr. Greene: I have no cross-examination at this time.

Mr. Tonkoff: Then I will offer this exhibit in evidence, the newspaper, as Plaintiff's Exhibit No. 9.

Mr. Greene: We have no objection.

Mr. Clements: No objection.

The Court: The newspaper may be admitted as Exhibit No. 9.

LOUIS A. BOAS

recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Boas, on the 13th of January, 1953, did your paper publish the following— [129]

Mr. Greene: Now, I object to that on the ground that the document would be the best evidence.

The Court: Yes, I think it would be; you may show it to the witness.

Mr. Tonkoff: Perhaps it should be marked first.

The Court: Yes, you may have it marked.

(Testimony of Louis A. Boas.)

Mr. Clements: May we see that before it is handed to the witness?

The Court: Yes, you may. Mr. Bailiff, you may hand it to counsel.

The Court: Have you examined the article, Mr. Clements?

Mr. Clements: Yes, I have.

The Court: Mr. Bailiff, hand it to the witness.

Q. Will you examine Exhibit No. 10 and say whether or not that article appeared in the Daily Idahonian? A. I believe it did.

Q. Calling your attention to Paragraph No. 3, particularly——

Mr. Clements: Now, I object to his testifying from an exhibit prior to its being admitted in evidence.

Mr. Tonkoff: I think that is correct [130] and I will offer it in evidence at this time.

Mr. Greene: Now, your Honor, I object to it on the ground that the document shows on its face that it was published at a time when the proceeding in question was pending before Judge Martinson and prior to his disqualification and the transfer of this case to Judge Borg and, therefore, it is wholly immaterial in this case.

Mr. Tonkoff: The purpose, I believe, your Honor, is apparent in Paragraph 3.

The Court: This, I take it, is just something that does not concern the plaintiff at all but I will admit it. It is a publication of a matter of news. I don't think there is anything in it that will assist the jury

(Testimony of Louis A. Boas.)

or anyone else in determining any of the issues in this case. If you feel it is material, I will admit it and you may read it to the jury, that is, if you desire to offer it.

Mr. Tonkoff: Yes, I did offer it.

The Court: That is right, and it was admitted.

Mr. Tonkoff: I am not concerned in the entire article.

The Court: You will read the entire article, and not any one part of it. [131]

Mr. Tonkoff: Very well: "A criminal complaint was filed in Probate Court yesterday afternoon by a McKeesport, Pennsylvania, sophomore at the University of Idaho, charging a Moscow attorney with a felony as the result of an alleged altercation occurring on the University campus last December 14. The youth, Richard L. Shoup, charges Murray Estes with assault with a deadly weapon, a felony under the laws of Idaho.

"Estes voluntarily appeared and submitted himself to the jurisdiction of the Court, Probate Judge Lloyd Martinson said today. Preliminary hearing has been set for 9:00 a.m. Thursday at the Probate Judge's office. The complaint filed personally yesterday by Shoup charges that Estes came into a place of business near the University of Idaho campus, commonly called the Perch. About 30 college students were within the place, the complaint recites, and says he, Shoup, came into said place while defendant was there. That the defendant did violently assault Shoup and did exhibit a gun and

(Testimony of Louis A. Boas.)

did point the gun at Mr. Green, owner of the Perch, and did make repeated threats to use the gun for the purpose of killing the complainant.

“Shoup asked that a warrant be issued for Estes’ arrest. When informed of the charge, Estes voluntarily appeared and asked for preliminary hearing. Estes, well [132] known Moscow attorney, has practiced in Moscow for approximately 20 years and is presently in law partnership with Tom Felton. He served three terms as county prosecutor from January, 1935, to January, 1941. The complaint did not give any details of the alleged incident. Estes was not available for comment this afternoon.”

Q. Mr. Boas, one more question, as of May 13—up to May 13, from the time of this incident occurred on December 14, referred to in Exhibit No. 10, you had reports concerning the progress of the matter? A. What do you mean by reports?

Q. Well, by your reporters?

A. The reporters wrote news stories when anything of news value occurred.

Q. And did you pass upon any of those stories?

A. Yes, sir; most of them.

Q. Were you during the Christmas holidays in Los Angeles?

A. Yes—just a moment, what Christmas holidays?

Q. 1952-53, these last ones? A. Yes, I was.

Q. And did you at that time have occasion to meet with and to talk with Mr. Bob Hooper?

(Testimony of Louis A. Boas.)

A. Yes.

Q. Did you at that time make any statement concerning any [133] publication that you were going to make in this case?

A. No, sir, I didn't.

Q. You never made any statement?

A. No, sir.

Q. As of May the 13th, from the reports that you received from your reporters, did you ever discover anything dishonest concerning Judge Borg, concerning his handling of the Estes matter?

Mr. Greene: That is objected to as incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Greene: And also it calls for a conclusion.

The Court: Yes, it would be purely an opinion of this witness.

Mr. Tonkoff: It is for the purpose of showing malice, I simply want to state my reason for asking.

The Court: The objection is sustained.

Mr. Tonkoff: That is all, Mr. Boas.

Mr. Greene: I have no questions.

Mr. Clements: I have no questions.

Mr. Tonkoff: I would like to recall Mr. Johnston for a question or two. [134]

WILLIAM F. JOHNSTON

recalled as a witness by the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Johnston, what is the size of the Tribune?

A. The current circulation is about 15,000.

Q. Perhaps you told me that yesterday; it is about that, you think? A. Yes, about that.

Q. And that would be about how many readers, about 50,000?

A. Perhaps not quite that many.

Q. What would be your estimate?

A. About 45,000.

Q. How many people does the Tribune employ?

A. I don't know.

Q. What was your capacity? I think you said, but I have forgotten.

A. I am managing editor.

Q. As managing editor, you are, I assume, authorized to pass upon some of the articles that are published in the paper?

A. Some of them.

Q. As a matter of fact, Mr. Johnston, on January 14, Wednesday, January 14, at that time did your paper carry a statement or make a statement that Judge Martinson had—— [135]

Mr. Clements: Now, we object to this method of examination. If he is referring to an exhibit, then, of course, the exhibit would be the best evidence and

(Testimony of William F. Johnston.)

we object to this, whatever the evidence is or rather the exhibit, we don't know anything about that.

The Court: Yes, the paper would be the best evidence.

Mr. Tonkoff: If he knows about it, I thought I would be entitled to question this witness.

The Court: If he knows about it—of course, he would be entitled to see the paper.

Mr. Tonkoff: Did your Honor sustain the objection?

The Court: Yes, the objection is sustained. This witness would be entitled to see the paper before he was asked to testify from memory here.

Q. Mr. Johnston, how much trouble would it be for you to supply us with copies of the Tribune commencing with January 14, 15, 16, 17, 18 and 21 and 22, of 1953, would it be very much trouble?

A. If that was the desire of the Court we would do our best to get them.

Q. And March the 13 and 29 and April 10, 14, 16, 18, 22, 23, 26, 28 and May 5, 6 and 7; would it be possible for you to get those for us? [136]

A. We don't know; some of our papers we have as our file copies and some of those for those dates we might have extra copies.

Q. Would you make an effort to have them for us tomorrow?

Mr. Clements: May I make an observation, if the Court please?

The Court: Yes, you may.

Mr. Clements: We don't think that we should

(Testimony of William F. Johnston.)

be put under this obligation. This case has been pending here a long time and has been set for trial for two or three weeks and these papers or documents have not been subpoenaed, some of them are available and some are not and to ask the defendant to do that I think is very unfair at this stage of the proceeding.

The Court: I am inclined to think that if they are like the other articles that have been offered here, they are just news articles and we are not trying this paper for the publication of any article except the one that is before the jury at this time. Did I understand you objected to this?

Mr. Clements: Yes, your Honor, we do object.

The Court: The objection is sustained.

Q. What is the value of the plant at Lewiston?

A. I don't know. [137]

Q. Do you know who could inform us on that score? A. Mr. Alford is the publisher.

Q. And is he here now? A. Yes, sir.

Mr. Tonkoff: That is all.

Mr. Greene: I have one or two questions.

The Court: You may cross-examine.

Cross-Examination

By Mr. Greene:

Q. Do you keep track of your circulation by counties?

A. Yes, we have that but I do not have it with me.

Q. I was wondering if you could tell me approxi-

(Testimony of William F. Johnston.)

mately what your circulation was in Latah County in the Spring of 1953?

A. No, I can't answer that.

Q. Could you give us an estimate on that?

A. I would estimate about three or four hundred but it is only a guess.

Mr. Greene: That is all.

Mr. Clements: No questions. [138]

A. L. ALFORD

recalled as a witness for the plaintiff, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Mr. Alford, what is the amount of stock issued by the Tribune Publishing Company?

Mr. Clements: What was that question?

Mr. Tonkoff: What is the amount of the stock issued by the Tribune Publishing Company?

Mr. Clements: We object to that as incompetent, irrelevant and immaterial.

The Court: Well, he might like to advertise his paper. He may answer.

Mr. Greene: My objection to the question is that it does not state whether it means issued or authorized.

Mr. Tonkoff: I will make a long story short.

Q. What is the value of the plant, do you know?

A. I don't know.

Q. What capacity do you occupy?

(Testimony of A. L. Alford.)

A. Publisher of the newspaper.

Q. Do you own any stock?

A. Nine shares of stock. [139]

Q. You attend the meetings of the stockholders?

A. Yes, sir.

Q. You are a director? A. Yes.

Q. Do you know how much stock is outstanding, what the company is incorporated for?

A. I believe 150 shares.

Q. And is it all issued? A. Yes.

Q. What is the par value?

A. I cannot say, I don't know.

Q. What is the value set on the stock?

A. I couldn't answer that.

Q. What is a share worth?

A. There is no set value.

Q. And you wouldn't know the value of the plant? A. No, I wouldn't.

Q. And how long have you been with the firm?

A. I told you yesterday, I have been with the paper since 1928.

Q. I had forgotten. I didn't mean to repeat. How often do you attend the stockholders' meetings?

A. Whenever they are held.

Q. How often are they held? Is there any prescribed time, about how many do you have a [140] year?

A. There is a prescribed annual meeting.

Q. Do you have financial statements issued at different times?

(Testimony of A. L. Alford.)

A. Not generally speaking, no.

Q. Did you have one issued here some time back?

A. Issued to whom?

Q. Do you have a compilation of the finances, a financial statement of the company?

A. No; that information is confidential and it is available to the owners of the business only.

Q. Have you seen any of those financial statements? A. Yes, I have.

Q. I am going to ask you again, do you know the value of the business? A. I said no.

Q. I assume that you saw that financial statement prepared for income tax purposes, did you not?

The Court: Now, let's not get into the income tax business in this case.

Mr. Tonkoff: I take it, your Honor, that would show just what——

The Court: Go ahead, go ahead.

Q. In the income tax report there are figures which would indicate the value of the business, are there not?

A. If you were a sufficiently brilliant accountant, I assume [141] that they would.

Q. Would it necessarily take an accountant? Do you mean that as a stockholder you are not interested in discovering what that report is?

A. Yes, I am interested.

Mr. Tonkoff: That's all.

Mr. Clements: No questions.

Mr. Tonkoff: We rest.

The Court: The jury may retire at this time for a few minutes.

The Court: The plaintiff has announced that he rests. Do you have any motions that you desire to make?

Mr. Clements: I beg your pardon, I did not hear counsel state that they rested. In the interest of time counsel have agreed that the motions on behalf of all of the defendants will be made through one counsel if that meets with the Court's approval.

The Court: That will be all right.

MOTION FOR DIRECTED VERDICT

Mr. Greene: Comes now the defendant, Tom C. Thomas, and respectfully moves this Court at this time for a directed verdict in favor of this defendant for the following reasons: That the undisputed evidence offered by the plaintiff fails to prove that this defendant was in any manner or in any fashion responsible by [142] acquiescence, consent, approval or otherwise for the publication of the alleged libelous article appearing in the May 13, 1953, issue of the Daily Idahonian and is, therefore, not guilty of the alleged libel charged by the plaintiff in his complaint.

I might say, your Honor, in support of that motion that paragraph four of the complaint alleges that the defendant, Thomas, on or before the 12th day of May, 1953, became the author of a written article concerning this plaintiff, which article, or quotations therefrom, was printed in the Daily Idahonian on May 13, 1953, with the consent, knowl-

edge and authorization of the defendant, Thomas. There is no proof in this case, your Honor, that Captain Thomas ever had any kind of a written article, and there is no proof that it was ever turned over to the newspapers or that it was published with the consent, knowledge and acquiescence of the defendant, Thomas. I want to say further that so far as the address that Captain Thomas made at the High School of which there is evidence here. It is apparent on its face that he could not be a joint tort-feasor with the defendant newspapers because of a verbal address made at the High School and a written article published in the newspaper. I point out that one address or words spoken by one person and another was spoken by another person and they [143] could not be joint tort-feasors further for the simple reason Thomas' measure of damages to the plaintiff would be based on an audience of some 200 people, where, on the other hand, the measure of damage by the newspaper would be the circulation of the newspaper in Latah County and in Eastern Washington which, I believe, was testified as some 4,500, so it is apparent on its face that based on the publication alone and the circulation that the two defendants could not become joint tort-feasors and not being joint tort-feasors they are not properly joined as defendants in this action.

Further, on behalf of all of the defendants, the plaintiff having rested its case, the defendants in both actions now respectfully renew their motion to dismiss heretofore filed in this action against the plaintiff's complaint, claiming that the com-

plaint failed to state a claim against the defendants upon which relief could be granted, which motions were heretofore overruled by the Court subject to the right of renewal upon the trial of said action—the motion is made upon the following grounds and for the following reasons: One, that the consideration of the entire article and the facts and circumstances in connection with their publication establishes that the alleged libelous language was not libelous per se so that the complaint could not state a [144] cause of action against the defendants in the absence of allegations and proof of special damages.

Two, that upon consideration of the entire article and the facts and circumstances in connection with their publication shows that they were made without express malice, were fair comment upon matters of public concern and were therefore privileged.

Third, that the evidence fails to state the degree of certainty required by law as to the damage, if any, to plaintiff's reputation caused by any one article, both articles or circumstances other than the alleged libelous publication, sufficient to sustain an award of damages by a jury, and would be purely speculative.

The Court: Mr. Bailiff, you will recall the jury, please. I will excuse you, ladies and gentlemen of the jury, until 10:00 o'clock tomorrow morning. There are matters that the Court must decide in the meantime and I will meet you here at 10:00 o'clock tomorrow morning.

(Whereupon, the jury was excused.)

The Court: Now, then, gentlemen, I will hear you on this motion.

Mr. Clements: I wonder, if the Court please, if we might have the regular afternoon recess at this time? [145]

The Court: Yes, I think that would be a good idea. We will take a 15-minute recess.

April 6, 1954, 3:10 P.M.

(Arguments of counsel and remarks of Court on motion to dismiss were made at length, not transcribed.)

April 7, 1954, 10:00 A.M.

The Court: In this case the plaintiff charges that the defendant, Thomas, on or before the 12th day of May, 1953, became the author of a written article concerning this plaintiff, which article, or quotations therefrom, was printed in the Daily Idahonian on May 13, 1953, with the consent, knowledge and authorization of the defendant, Thomas, and circulated throughout the States of Idaho and Washington. By no stretch of the imagination can it be said that Captain Thomas was the author of the written article in any way; he had nothing to do with its publication and therefore it would be impossible to say that the plaintiff in this case had established any proof of this allegation of the complaint. The action, as far as T. C. Thomas is concerned, is dismissed.

I have given a good deal of thought to the [146]

balance of the motion and although the Court feels that the publication was a fair and honest report of what took place at this meeting, nevertheless, there is some question in regard to it. I know that the Court should take a positive stand on this matter but I am going to overrule this motion as to the two newspapers without prejudice and I will still consider the matter further either before or after verdict.

The Court: You may call the jury, Mr. Bailiff.

(The following in the presence of the jury.)

(Opening statement by Mr. Reed Clements.)

The Court: You may call your first witness.

Mr. Clements: Yes; we call Mr. Melvin Alsager.

MELVIN ALSAGER

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Clements:

Q. Mr. Alsager, how old are you?

A. I am 36.

Q. What business or profession are you engaged or occupied in? [147]

A. I am a lawyer.

Q. You are licensed to practice law in the State of Idaho?

A. That is correct.

Q. When were you admitted to the bar?

A. I was admitted November 21, 1950.

Q. Do you occupy any official position in Latah County at this time?

(Testimony of Melvin Alsager.)

A. I am the present Prosecuting Attorney of Latah County.

Q. When were you elected Prosecuting Attorney?

A. That would be in November of 1952.

Q. When were you sworn into office?

A. I believe it was on January 12, 1953.

Q. From the time that you were admitted to the bar until you became Prosecuting Attorney, did you have any experience in the practice of criminal law?

A. I had a few cases.

Q. Had you ever had occasion to conduct a preliminary examination on behalf of defendants in criminal cases prior to the time that you became Prosecuting Attorney?

A. I had one, I am sure.

Q. And where was that conducted?

A. I believe that was in the Police Station here in Moscow.

Q. Prior to the time that you became Prosecuting Attorney had you had occasion to transact any professional business [148] before John Borg, Justice of the Peace? A. Yes.

Q. What place was it transacted, whatever business you had before him, where was it transacted?

A. The only place was in the Police Station here at Moscow.

Q. Do you recall the circumstances of a complaint being filed—I will withdraw that question—about what time of the day on January 12 were you sworn in as Prosecutor?

(Testimony of Melvin Alsager.)

A. I think it was around 2:00 o'clock.

Q. And where were those proceedings held?

A. In the district courtroom.

Q. And at any time during the day of January 12 were you informed that any criminal complaint had been filed in any court?

A. Yes. I was sworn in at 2:00 o'clock and then I went to my office and I believe it was within 15, yes, about 15 minutes, it was between 2:15 and 2:30 that I received a telephone call from Judge Martinson to the effect that a criminal complaint had been filed in his court.

Mr. Tonkoff: Now, we object to that as hearsay.

The Court: He has answered and the answer may stand.

Q. Did you later receive a copy of the [149] complaint?

A. Mr. Martinson called me and asked me——

Mr. Tonkoff: Any conversation of this kind is objected to that is not in the presence of the plaintiff. I want to make that objection to all of these conversations with Judge Martinson.

The Court: Well, now, this goes to the honesty of practically all of the officials connected with this matter and I believe I will let the jury have all of the facts. He may answer.

A. When Judge Martinson called me and said that a criminal complaint had been filed against Mr. Estes he inquired what I thought about it and I informed him to have his secretary prepare a copy

(Testimony of Melvin Alsager.)

of the complaint for me and that I would pick it up on my way home that evening.

Q. Did you pick it up on your way home?

A. Well, after that time, shortly thereafter, 15 minutes or so, Mr. Martinson came to my office, that was the same afternoon, and discussed this matter with me.

Q. Did he leave a copy of the complaint with you at that time?

A. I don't believe that he left one at that time. I can't recall, but I don't believe that he left one with me at that time.

Q. Did any other person talk with you about this on that same afternoon on January 12?

A. Yes, Mr. Laurence Huff came to my office that same afternoon. [150]

Q. And was this case discussed by you and Mr. Huff? A. Yes, it was.

Q. Just state what transpired between you and Mr. Huff and how he happened to meet you?

A. Well, he came into my office about—it is hard to get these times straight, but he came in that afternoon about 4:00 o'clock, I don't know for sure just the exact time, and he explained to me that he wanted to help me out and he said that he was the oldest member of the local bar and he said that he thought that he had some things that would help me out in this particular case.

Q. And what else was said?

A. I said, well, you go right ahead and tell me what you want to tell me, and he explained to me

(Testimony of Melvin Alsager.)

that under the circumstances and in view of the fact that this complaint, this criminal complaint, had not been filed through my office in the first instance, that the proper procedure for me to follow was to move the Court to dismiss this particular complaint that was on file in the Court now.

Q. Did he volunteer to do anything else in that respect?

A. Well, we discussed the matter a little bit and he volunteered to have or he said that he would get his secretary to prepare the proper papers to move to dismiss this complaint.

Q. Did he make any representations to you at that time that [151] he was appearing as Mr. Estes' lawyer?

A. I didn't get that impression. He didn't say that in so many words, he just said that he was the oldest member of the bar and that he wanted to assist me in this stage of the case. I don't think that he said at that time that he was representing Mr. Estes, no.

Q. Did he later appear at your office with a prepared motion for dismissal of the action?

A. The next morning, which was Tuesday, he came to my office about 10:00 o'clock with a motion—with papers prepared in his office. A motion to dismiss and, I believe, an order along with it.

Q. What did you do with regard to this suggested motion that he proposed?

A. Well, we discussed it a little bit while I was still in my office and I signed the paper on the

(Testimony of Melvin Alsager.)

motion to dismiss and then we went up to the Probate Judge's office in Mr. Huff's car.

Q. What transpired up there?

A. Well, when we got up there we discussed the matter pro and con for quite some time. Judge Martinson didn't like to be faced with a motion to dismiss and Mr. Huff was trying to show us that it was the proper thing to do in this case. We discussed it pro and con and I believe that [152] was about noon, at least, we all had to leave and I believe it was probably noon, so Judge Martinson asked me whether I was tendering that paper for filing and I said that I was not and I said, do not file this paper, and I said not to do anything more in regard to this motion unless you hear from me again.

Q. Did you leave the motion in Judge Martinson's custody at that time?

A. I don't believe that I took that paper back with me to my office, I don't recall taking it back.

Q. Up to that time had you ever met or talked to a boy by the name of Richard Shoup?

A. No, I had never talked to Richard Shoup at all.

Q. Did you know anything about the circumstances of the complaint that Judge Martinson said had been filed in his Court?

A. No, I didn't know anything about the facts of the case at all.

Q. Do you know where that written motion is now, the instrument that you signed?

(Testimony of Melvin Alsager.)

A. No, I don't know what happened to it after I left the Probate Court, but to the best of my knowledge it was never filed, but what happened to the original of that I don't know.

Q. Were you furnished with a copy of it? Did Mr. Huff provide [153] you with a copy?

A. I think there was an extra copy, yes, I believe that I had a copy of it.

Q. Handing you defendant's Exhibit No. 11, will you examine that and if you are familiar with it explain what it is and how it came into your possession and who it was prepared by, if you know?

A. Well, this appears to be a copy of this motion for dismissal which was prepared in the office of Mr. Huff.

Q. Do you think it is a true copy of the original which you signed and left with Mr. Martinson?

A. I believe it is a true copy, yes.

Mr. Clements: Mr. Bailiff, I will ask you to hand that to counsel, if you will. We offer this exhibit in evidence at this time.

Mr. Tonkoff: We have no objection.

The Court: It may be admitted.

Mr. Clements: May I read it to the jury at this time?

The Court: Yes, you may.

Mr. Clements: This is entitled in the Probate Court of Latah County, State of Idaho. State of Idaho, Plaintiff, vs. Murray Estes, defendant. Motion for Dismissal. Comes now Melvin J. Alsager, the duly elected, qualified and acting Prose-

(Testimony of Melvin Alsager.)

cuting Attorney of Latah County, [154] and shows to the Court:

That the complaint in the above-entitled matter apparently prepared by a private attorney, was filed in the above-entitled Court on January 12, 1953, in less than 10 minutes from the time when the undersigned was sworn into the office of Prosecuting Attorney of Latah County.

It appears from such complaint that the alleged incidents upon which such complaint arose occurred on December 14, 1952, approximately one month prior to the date of filing such complaint. The undersigned was not consulted by the complaining witness or any person on his behalf either before or since such complaint was filed. The matter was investigated by J. M. O'Donnell, the undersigned's predecessor in office, and Mr. O'Donnell was unable to find any evidence whatsoever upon which to base a felony charge, nor did the complaining witness ever request Mr. O'Donnell to file a felony complaint. The undersigned is informed and believes that the complaint was filed herein as a foundation for a civil action.

The undersigned believes that he would be remiss in his duties if he permits the taxpayers of Latah County to become involved in expenses of a felony proceedings when he, as Prosecuting Attorney, has never been consulted by the complaining witness.

Now, therefore, the undersigned, Melvin J. [155] Alsager, Prosecuting Attorney of Latah County, Idaho, moves this Court for the entry of an order

(Testimony of Melvin Alsager.)

of an order herein dismissing the complaint on file herein, Dated this 13th day of January, 1953, and there is a line for signature, under the line is typed, Melvin J. Alsager, Prosecuting Attorney.

Q. At the time that you executed this instrument had you ever discussed this matter with your predecessor in office, Mr. O'Donnell?

A. Well, just passing,—when we moved some of the county supplies from his office to my office, just in passing we discussed it just that way, yes.

Q. You were not acquainted with any of the details or circumstances? A. No, oh, no.

Q. You did know of the nature or the extent of any investigation that might have been made?

A. Oh, no.

Q. Mr. O'Donnell never discussed with you the details of the investigation? A. No.

Q. Did you ever request or did you order Probate Judge Martinson to actually file this thing, this motion?

A. I don't remember. When we closed that hearing up there I know I told him not to file it. I don't believe that I ever ordered him to file it. [156]

Q. And that was on January 13?

A. That was the second day, the day after, that would be Tuesday, yes.

Q. Did you have any discussion or was any arrangement made or discussed between you and Judge Martinson on the 13th, the second day, about where the hearing was to be held?

(Testimony of Melvin Alsager.)

A. No, I don't believe that there was any discussion at all about where the hearing was to be held.

Q. Did you have any discussion on that date as to whether Judge Martinson would preside or whether he was going to disqualify himself?

A. Now, this is Tuesday, the 13th?

Q. Yes, sir.

A. That afternoon, when I went home about five o'clock that afternoon I stopped by the Probate Judge's office and Judge Martinson and I discussed this matter some more at that time. He indicated to me at that time that he was contemplating disqualifying himself in the matter and I tried to urge upon him not to do so and we discussed it for some time, maybe an hour or so. I know that it got to be supper time and he said that later that evening he would give me a ring and give me his decision as to what he was going to do in this particular matter.

Q. Did he telephone you later that day?

A. That is right, after I got home he called me and told me [157] that he had determined that he should disqualify himself in the matter.

Q. Now, what was done in regard to the case on the 14th of January. What contact did you have with it and what did you do as Prosecuting Attorney?

A. On the 14th of January—

Q. —Let me withdraw that last question. To your knowledge was there ever any warrant of arrest issued against Mr. Estes after that complaint

(Testimony of Melvin Alsager.)

had been filed? A. Not to my knowledge.

Q. Now, what did you do on the 14th?

A. On the 14th, just before noon I received a phone call from Mr. Huff inquiring whether I was going to dismiss this complaint. I told Mr. Huff that I would meet with him in his office at one o'clock that same day and I went home for lunch and came back and stopped right outside of his office and I went into his office,—I didn't sit down or anything, I just told him that I was not going to dismiss this case and that I would appear at the hearing the next day or when it was to be heard.

Q. What was the next transaction on that day in regard to this case. What did you do after you saw Mr. Huff, did you see Judge Martinson?

A. Now, this was on Wednesday, is that the day?

Q. This was the 14th? [158]

A. Wednesday, is that correct?

Q. That is correct, Wednesday, the 14th.

A. That afternoon, the first thing that I did after I got back from lunch and got back to my office I called the University and tried to get hold of this boy, Richard Shoup, whom I had not seen up to that time. I don't know where he was or anything but I insisted that he come to my office immediately and he came within a very short time,—within a very short time he was in my office.

Q. What did you do, if anything, in regard to taking a written statement from him as to what transpired in regard to filing this complaint?

(Testimony of Melvin Alsager.)

A. He came in and I talked to him for a few minutes and I had my secretary take down a statement, a statement of this entire incident surrounding the filing of this complaint.

Q. Now, what was the next incident that arose in connection with this case after you finished talking to Mr. Shoup?

A. Well, even during this time I received a phone call, the same day, I believe, from Mr. Martinson that he had transferred this case to Mr. Borg at the Elks.

Q. After you got this information what did you do?

A. Well, we continued to interrogate Mr. Shoup and to get his story and to go over that, to go over the witnesses that he had and so forth. It was about five o'clock and I had [159] not heard from Mr. Borg at all so I had my secretary call and see whether he was still at the Elks and she informed me that he was and then I proceeded to go over, it was around five o'clock, I believe, that I went to the Elks Temple.

Q. What, if anything, did you take with you?

A. I took a volume of the Idaho Code along with me.

Q. Did you have a conversation at the Elks Temple on the afternoon of January 14, with Judge Borg?

A. Yes, I found him in the card room and I asked him to come out in the outer lobby there and——

(Testimony of Melvin Alsager.)

Q. —Before you get into that, let me ask, was this the first criminal proceedings that you had had any experience with as a prosecutor?

A. Yes.

Q. Now, proceed with your discussion with Judge Borg?

A. I asked Mr. Borg if he would come out in the outer portion of the main lobby of the Elks Temple, which he did. I asked him if he was going to ask me to appear at this hearing and he said, "No," he said he wasn't going to and I told him that I was going to appear at the hearing and he said that I shouldn't appear at the hearing, that I would be committing political suicide if I did and that his advice to me was that I should stay away and not appear. [160]

Q. Did he say anything about your predecessor in office, Mr. O'Donnell as to how Mr. O'Donnell used to carry on preliminary hearing?

A. Yes, after this conversation with Mr. Borg, I told him that because of the very nature of this case it might look bad if I didn't show up and he then mentioned to me that Mr. O'Donnell had not made a practice of appearing at preliminary hearings and he could not see why I should be insisting on appearing at this one.

Q. Now, did you have any telephone conversation the following morning with Judge Borg,—withdraw that question, please,—what, if anything did you do after that conversation with Mr. Borg that afternoon, in regard to preparing the case for trial.

(Testimony of Melvin Alsager.)

A. While I was there talking to Mr. Borg I had this volume of the Code with me and I was going to go over some things with him there and he said to me, he told me that there was no use for me to go over any matters with him there, anything from the Code, because this very book that I was trying to quote to him from, he said that it said right in there that he did not have to know any law and he didn't want me to quote anything to him.

Q. Now, after you left Judge Borg, did you do anything toward making any arrangement with regard to your witnesses for the next morning? [161]

A. Yes, but I kind of left it up to this Dick Shoup to get the other witnesses that he had with him, it was more or less left up to him to get them for me.

Q. Did you get any subpoenas issued for the attendance of those witnesses?

A. No, I did not.

Q. Why didn't you?

A. Well, one thing was that it just never occurred to me and the other was that I knew this Shoup boy would be there with his witnesses. They were demanding at that time to be there and I had no reason at all to think that they would not show up.

Q. What arrangement did you make with these boys as to where they were to meet you for this hearing?

A. I believe that I told them to be there, to be at the Police Station at nine o'clock, or before that if they could, that was just about the extent of it.

(Testimony of Melvin Alsager.)

Q. Now, referring back to your conversation with John Borg early in the afternoon, was anything said in that conversation with him as to where this preliminary hearing was to be held?

A. No, there wasn't a thing said about that.

Q. And up to that time all of the business that you had ever transacted with him or before him, as a lawyer, was at his office in the Police Court, at the Moscow City Hall, [162] is that correct?

A. That is correct.

Q. Now, did you have any conversation with Justice Borg on the morning of January 15, which would be the morning of the hearing?

A. Yes, around eight o'clock I called the Borg residence and I believe that Mrs. Borg came to the phone and then later she got her husband and I said, "John, this is Melvin Alsager and I just want to tell you that I am going to be at that hearing at nine o'clock this morning." And he said a word or two which I don't even recollect now as to what it was, but he did say a word or two and that is all there was to it.

Q. Was there anything said in that conversation as to where the preliminary hearing was going to be?

A. Not to my knowledge, there was nothing said about it.

Q. What did you do after that conversation?

A. Well, I had to get a court reporter, it seemed that the court reporter that we have here in town was out of town and the night before I had been working through the University up here to get a

(Testimony of Melvin Alsager.)

competent reporter to take this testimony. It is difficult to get someone that is competent to take it, and I worked through the personnel department up at the University and so I went up to the University shortly after eight o'clock to get a court [163] reporter to take this testimony.

Q. Did you get one?

A. That is right, they supplied me with one but I couldn't get the girl until about 10 minutes to nine o'clock and I picked her up at West Sixth Village.

Q. Why didn't you get her before that?

A. Well, she had a class or her husband had a class or something, anyway she was not available until 10 minutes to nine and I was just waiting around for her, I had to sit around and wait for her.

Q. What time did you and this young lady arrive back at the Police Station?

A. Well, I believe that it was about 10 minutes to nine or anyway a little bit before nine. She was ready and we drove right down to the Police Station and we must have got there two or three minutes before nine. It was a little before nine o'clock.

Q. When you arrived at the Police Station, what employees were there at that time in connection with the running of the Police office?

A. If I recall, Peggy David was the Police matron there on the telephone and there were several city policemen, uniformed policemen there.

Q. Was Mr. Shoup there at that time?

A. Yes, he was there. [164]

Q. And were the other witnesses that you had

(Testimony of Melvin Alsager.)

arranged for there? A. Yes, they were there.

Q. About how many were there, as near as you recall, at that time?

A. You mean the witnesses?

Q. Yes.

A. There was about nine witnesses.

Q. After you returned with your secretary or reporter, what did you do, if anything, in regard to contacting Judge Borg?

A. Well, the minute I came through the Police Station door I took a glance around through the other room and I saw that Mr. Estes was not there and no one else was there and I immediately got this Peggy David on the phone and I told her to——

Q. Before we go into that now, beside the police matron and the policemen and your nine witnesses, were there any other spectators there that morning?

A. Yes, there seemed to be an awful lot of milling around in the place and out on the street in front there, yes, there were quite a few people.

Q. And what did you request Mrs. David to do, if anything, for you?

A. I had Mrs. David try to contact Mr. Borg and I believe [165] that is what she tried to do.

Q. Did you have any telephone conversation with John Borg that morning, January 15, 1953, where you yourself had a telephone conversation with him at the Assessor's Office sometime after nine o'clock?

A. No.

Q. Was the telephone conversation you had with

(Testimony of Melvin Alsager.)

him at home, at eight o'clock that morning, the only conversation you had with him that day?

A. Yes.

Q. When did Mr. Borg finally show up at the Police Station?

A. I don't know, I would say that it might have been 9:15, we stood around there waiting and it could have been 9:15.

Q. Did you have any conversation with him upon his arrival?

A. Yes, when he came through the door I motioned him aside. I was trying to help him get the thing set up and he informed me that the case was dismissed and it was all closed and there was nothing more to it.

Q. Did he make any proposition to you as to whether he could get this thing rectified or not; did he explain to you as to why he dismissed it?

A. Well, he may have said, I don't recall, but he may have said that I and the witnesses didn't show up or something, he might have said that.

Q. Did he offer to give you or afford you the opportunity [166] of another hearing on the matter?

A. No.

Q. He made no suggestion as to any further proceeding in the case? A. No.

Q. Was that about the substance of what went on between you then? A. That is about it.

Q. How long did he stay there—did he stay there in the Police Court or did he go on up town?

A. He didn't stay there very long because I was

(Testimony of Melvin Alsager.)

just furious and I told him that as long as I was Prosecuting Attorney I would never have anything more in his Court and I immediately went to the telephone and tried to call the District Judge in Orofino and while I was waiting for that, Mr. Borg left.

Q. Did you have occasion to have any connection with a case filed before Justice Kent Powers at the second justice precinct in Latah County on a complaint filed against Mr. Murray Estes about the following Sunday or on the 17th of January?

A. Yes.

Q. Who swore out that complaint?

A. That was sworn out by myself. [167]

Q. What was Mr. Estes charged with in that complaint?

A. He was charged with assault with a deadly weapon against one L. G. Greene.

Q. Was it E. G. Green?

A. It might have been E. G., it was Mr. Greene.

Q. Did you direct that a warrant of arrest be issued at that proceeding? A. Yes.

Q. And was a preliminary examination date set for that hearing? A. Yes.

Q. And was the matter tried before Justice Kent Powers?

A. No, he was disqualified by an affidavit of prejudice by Mr. Estes.

Q. And who was the case transferred before?

A. It was transferred to Mr. Borg.

Q. And was the preliminary examination held

(Testimony of Melvin Alsager.)

on that matter before Judge Borg? A. Yes.

Q. Were there any subpoenas issued in that case? A. Yes.

Q. Over the signature of Judge Borg?

A. Yes.

Q. Who prepared those subpoenas?

A. They were prepared in my office. [168]

Q. Handing you Defendant's Exhibit No. 12, marked for identification, I will ask you to examine those just briefly to refresh your memory. Are you acquainted with the signature of John Borg?

A. I believe that is his signature.

Q. Are those the subpoenas that you just referred to in your direct testimony?

A. Yes, sir, they are.

Mr. Clements: We offer this exhibit in evidence.

Mr. Tonkoff: I assume they were issued. I see no materiality in them.

The Court: They may be admitted.

Mr. Clements: I will just read one of these, with your Honor's permission.

The Court: Yes, and then give the names in the others.

Mr. Clements: "In the Justice Court of Latah County, State of Idaho. State of Idaho, plaintiff, vs. Murray Estes, defendant. Subpoena. The people of the State of Idaho and Latah County: To Hugh Keith.

"You are hereby commanded to appear at the courtroom of the above-entitled court at the Moscow

(Testimony of Melvin Alsager.)

Police Station on the 21st day of January, 1953, at [169] 10:00 o'clock a.m., then and there to testify what you may know in the above-entitled action now pending before said Court on the part of the plaintiff, the State of Idaho. Attest my hand, affixed this 20th day of January, 1953. John K. Borg, Justice of the Peace. State of Idaho, County of Latah, ss. William W. Logan, Jr., of said county, being duly sworn, says that he served the within subpoena by showing the original to each of the following persons named therein, and delivering a true copy thereof to each of said persons personally on the blank day of January, 1953, at the said County of Latah. Hugh Keith." And that is signed William W. Logan, Jr. "Subscribed and sworn to before me this 21st day of January, 1953, John K. Borg." And a similar subpoena with the names of the following, one for each, Richard Shoup, James Hearn, Charles Murrin, Omar E. Carroll, Moscow Police Officer Jack Shaw, Elna Wilson, Donald Makinson, Bill Lawr, E. G. (Long) Greene.

Q. What arrangement, if any, did you make to have a court reporter take the preliminary examination in the charge that was referred to here, on the 21st of January?

A. I called up Mr. Tunnicliff and informed him that I wanted him to take the preliminary examination in this hearing.

Q. Where was that hearing actually held, where did it start?

A. It started at the Police Station, but due to

(Testimony of Melvin Alsager.)

the many [170] people that were there at that time, by stipulation of counsel, it was moved up to the district courtroom.

Q. When it was held in the courtroom did Mr. Tunncliff officiate as the official court reporter in taking the testimony?

A. Yes, I believe so; yes, he did.

Q. At that time Mr. Estes was represented by an attorney, was he not? A. Yes.

Q. Who was the attorney who appeared for him in that case?

A. I believe it was Laurence Huff.

Q. And was the testimony adduced at that hearing transcribed later and introduced in the form of a written transcript, by Mr. Tunncliff?

A. I believe it was, yes.

Q. About how many witnesses testified in that proceeding?

A. I believe it was at least eight or nine.

Q. And it would be the ones whose names I have read here? A. Yes, those all appeared.

Q. What action did Judge Borg take after he had heard all of the testimony in that case?

Mr. Tonkoff: That is objected to as immaterial and irrelevant.

The Court: He may answer. [171]

A. Judge Borg dismissed the case.

Q. What did he say, if anything, when he dismissed the case, if you recall?

A. I cannot recall just what he said. He dismissed the case and he may have said something

(Testimony of Melvin Alsager.)

else but I just don't recall what he said at that time, but he did dismiss the case.

Mr. Clements: We have another subject to go into and it will be quite long, your Honor.

The Court: We will recess at this time for 15 minutes.

April 7, 1954, 11:10 A.M.

The Court: You may proceed.

Q. Mr. Alsager, referring to the date of April 8, 1953, was there another charge filed against Mr. Estes in any court?

A. There was a battery charge filed in April, whether it was the 8th or not, I can't say, but there was a battery charge filed.

Q. In what court was that filed—would it have been Kent Power's court?

A. I believe that it was—it is hard for me to recollect whether it was in Kent Power's or Judge Martinson's court.

Q. And do you know whether it was transferred from Justice Power's court into another court, that is, the battery [172] case?

A. The battery case came into the Probate Court.

Q. And was finally disposed of in the Probate Court? A. Yes.

Q. And do you have any knowledge of a complaint being filed against Richard Shoup by Murray Estes in Justice Power's Court?

Mr. Tonkoff: Now, we object to that as incompetent, irrelevant and immaterial and it has nothing

(Testimony of Melvin Alsager.)

to do with the issues in this case; this is a charge now against Shoup.

The Court: He may answer.

A. What was that question again?

(Question read by reporter.)

A. There was another complaint filed, one against Mr. Shoup, that was two or three days after this battery complaint had been filed against Mr. Estes.

Q. Was there ever a hearing had on the battery charge, I mean, was there ever a trial?

A. No.

Q. In general will you just describe the course of the procedure that the battery charge took?

Mr. Tonkoff: Now, we object to that as incompetent, irrelevant and immaterial; we are trying the battery case and that has nothing to do with this case [173] here, it has nothing to do with Judge Borg nor was Mr. Estes involved and it was not heard before Judge Borg.

The Court: We are trying here newspapers for the publication of an article and I think that the jury are entitled to all of the facts in connection with it, and I will permit a wide scope, everything that took place as far as these parties are concerned. If you wish to withdraw the question, you may withdraw it.

Mr. Clements: I will withdraw it.

Q. Mr. Alsager, referring to the battery charge,

(Testimony of Melvin Alsager.)

was Mr. Estes represented by independent counsel other than himself in that proceeding?

A. I don't believe so.

Q. Was there a motion made to dismiss that case on the ground of double jeopardy, do you recall? I mention it to refresh your memory?

A. That is correct. After that battery charge was filed, subsequent to that time a motion to dismiss was made and I believe Mr. Huff was the attorney, yes, he was the attorney at that time.

Q. Was there a proceeding in the battery charge—that is, was the matter taken to the Supreme Court for any purpose, while it was pending?

A. The motion to dismiss was overruled by Judge Martinson and [174] on a writ of prohibition it was sent to the Supreme Court of Idaho, yes.

Q. What action did the Supreme Court of the State of Idaho take on it?

Mr. Tonkoff: The decision of the Supreme Court would be the best evidence.

Mr. Clements: I will withdraw that question.

Q. How was that case finally disposed of? Was it tried or was there a plea of guilty entered?

A. A plea of guilty was entered in that battery case.

Q. Were you present at the time the plea of guilty was entered? A. No.

Q. Were you advised of it?

A. Not before the plea was entered, no.

Q. You were not consulted by the attorney for

(Testimony of Melvin Alsager.)

the defendant or the presiding Probate Judge as to when the matter would be disposed of by plea?

A. No.

Q. Had the matter been set for trial, as you recall?

A. Yes, the matter had been set for trial.

Q. And this plea of guilty was entered prior to the date it was set for trial?

A. Yes, sir, that is correct.

Q. When did you discover that the matter had been disposed of by a plea of guilty? [175]

A. That was after the plea was given and Mr. Martinson called me on the phone and informed me that the Estes case was over; that he had appeared and that he had fined him a hundred dollars.

Q. Is the Murray Estes that you refer to in these four proceedings that we mentioned, is he one of counsel for the plaintiff in this trial?

A. Yes.

Q. What disposition, to your knowledge, was made of the charge that was pending against Richard Shoup?

Mr. Tonkoff: That is objected to; there isn't anything—if the plaintiff can recover he must recover on the allegation set forth in the complaint or complaints. There isn't anything in that matter which makes the answer to this question relevant in any manner. He is referring now to the Shoup trial and not the Estes matter.

The Court: It is all contained in this article, he may answer.

(Testimony of Melvin Alsager.)

A. Could I have the question again, please?

(Question read by reporter.)

A. That case was dismissed.

Q. How did—what brought about the dismissal, if the dismissal was on a motion to dismiss, who brought the motion or made the motion? [176]

A. It was on motion for dismissal and I believe that I made the motion. I am not positive on that, but I think I made the motion for dismissal.

Q. Was Mr. Shoup represented in that proceeding by an attorney?

A. He was represented by Mr. Goff.

Q. Mr. Abe Goff of Moscow, Idaho?

A. Yes, sir. Mr. Abe Goff.

Q. At the time that was dismissed had a hearing been set for the matter, had it been set for trial at the Courthouse?

A. Yes, a hearing had been set at the Courthouse.

Q. And was the charge dismissed at the Courthouse? A. Yes.

Q. Were there a great number of people there?

A. Yes, I think there was quite a few. I can't say how many, there were quite a few people there.

Q. Now, was there more or less of a public meeting held among the spectators after the case was dismissed? A. Yes.

Q. What was the topic under discussion at that time, without relating names or anything like that?

(Testimony of Melvin Alsager.)

Mr. Tonkoff: Now, that is objected to on the same ground as made yesterday——

Mr. Clements: I will withdraw the question and get at it another way. [177]

Q. In that group of people, following the dismissal of the Shoup case, was there any discussion in connection with the advisability of calling a grand jury among the citizens? A. Yes.

Q. Do you know of your own knowledge whether any petition petitioning the authorities for calling a grand jury had been filed or offered to be filed in the County Auditor's office?

Mr. Tonkoff: That is objected to as not within the issues of this case, your Honor.

The Court: The way I look at this is, you are suing here for damages and all of this talk, petitions for grand juries, public meetings, all of these meetings and other things occurred prior to the publication of this article in the paper and Mr. Borg was the subject of discussion in all of those meetings and all of those talks. This jury may be called upon to determine whether this article was damaging or whether he was damaged entirely by the public meetings, the demands for grand juries and other matters that transpired before the publishing of this article. He may answer.

A. Could I have that question again, please?

(Question read by reporter.)

A. I don't think that I knew that day. Subsequently, of course, I found out that there were

(Testimony of Melvin Alsager.)

petitions filed but [178] I don't think on that day that I knew anything about it, that is about the petition.

Q. Did you, subsequent to that day, prior to May 13, have any knowledge of such petitions?

A. Yes, I did.

Q. Have you any idea of the number of names on those petitions?

A. Well, the first I heard was 800 and then it got to 1400——

Mr. Tonkoff: ——That is objected to as hearsay.

The Court: The objection is sustained.

Mr. Clements: We will withdraw the question.

Q. Are you acquainted with Captain T. C. Thomas, the commanding officer of the N.R.O.T.C. at the University? A. Yes.

Q. Had you known him prior to May 13, 1953, or had you become acquainted with him?

A. Yes.

Q. Had you consulted with Captain Thomas or had he consulted you in regard to this Richard Shoup and the difficulty that he was involved in?

A. He consulted me.

Q. Was that frequently or otherwise?

A. It wasn't frequently. The first time he consulted me was [179] in the latter part of January, that was the first that I ever met Captain Thomas when he came to my office and informed me that this boy——

(Testimony of Melvin Alsager.)

Mr. Tonkoff: —Of Course, I object to what Captain Thomas has informed him.

The Court: He may answer.

A. Captain Thomas informed me that this boy, Richard Shoup, was not doing well in school, as a matter of fact that he was failing in his subject. He came to me at that time to just generally discuss what effect possibly this entire incident in the early part of January had had on the boy. That is the first time I ever met Captain Thomas.

Mr. Tonkoff: I move that be stricken. I don't want to continually object but I feel it is my duty.

The Court: Oh, yes, don't hesitate to make any objection that you care to make. I will try to rule as near right as I can.

Mr. Tonkoff: That is true, what I am referring to is continually getting up and down to make these objections.

The Court: Yes, but you go right ahead with what objections you desire to make.

Mr. Tonkoff: Your Honor, this is [180] something that Captain Thomas told him, as to what effect this might have, and in my opinion it is not admissible, certainly it is a conclusion that he might draw one way or another and it has nothing to do with the issues set forth here. In other words, your Honor, I take the position that if the plaintiff can recover he can only recover on what is set forth in Paragraph 5 and in that statement there is nothing about any remark or any statements that may have been made such as the witness is testifying about.

(Testimony of Melvin Alsager.)

The Court: I will instruct this jury later to take the article as a whole and not pick out any one clause in it but to take the entire article. If I remember right Shoup's story was told in this article, I haven't found it as yet. Yes, it says, "In the meantime Captain Thomas was explaining that the boy Shoup was undergoing a strain which was evidenced in bad grades and the possibility that he would be expelled from the Naval R.O.T.C." He may answer. That was on a motion to strike, was it not?

Mr. Clements: Yes, it was, your Honor.

The Court: The motion will be denied.

Mr. Clements: You may cross-examine. [181]

Cross-Examination

By Mr. Tonkoff:

Q. When were you admitted to the practice?

A. November 21, 1950.

Q. And between 1950 and the time that you took office as Prosecuting Attorney you were practicing in Moscow, I assume?

A. That is correct.

Q. And during the course of that practice you attended a hearing at the Police Court in which Judge Borg presided?

A. Yes.

Q. Mr. Alsager, that wasn't a preliminary hearing, was it?

A. I don't recall,—I think it was a State of Idaho case, it was a criminal matter all right, but whether it was a preliminary hearing I don't recollect.

(Testimony of Melvin Alsager.)

Q. What kind of a case was it, was it a traffic case or what?

A. No, if my recollection is correct, it was a case in which a fellow was selling literature here in town without a valid permit and a bond and so forth, and I was representing him in that matter.

Q. That is where he had his trial, is that right, it was a city matter connected with the city, a violation of the city ordinance, is that right?

A. I believe that Mr. O'Donnell was on the other side.

Q. That has nothing to do with what I am asking you. The [182] matter in which you appeared to defend this man was in violation of a city ordinance, isn't that right?

A. I don't know whether it was city or state, I just don't recollect.

Q. There is no similarity between defending a violation of the city or the state and a preliminary hearing, is there?

A. There is a difference.

Q. And the matters which concern or rather were concerned with preliminary hearings, so far as you know, they were held in the district courtroom in the Courthouse?

A. I didn't know that, no.

Q. After practicing here for two years you mean to say that you didn't know that?

A. I never had a preliminary hearing, when I was defending cases here, in the Courthouse, no, I never had one.

Q. Well, from your association with other coun-

(Testimony of Melvin Alsager.)

sel or things that you read in the paper, didn't you discover that such matters as preliminary hearings were held before the Probate Judge?

A. Well, if they are held before the Probate Judge, they are usually held in his office at the Courthouse.

Q. And that was the kind of a hearing that Mr. Estes was involved in, wasn't it?

A. Well, the difference, of course, being that this was in [183] the Justice Court and not in the Probate Court.

Q. When did you first learn about the controversy between Estes and Shoup?

A. Well, it was sometime between the time of the incident and when I was sworn into office. In passing along the street someone had mentioned it to me, that is how I knew about it.

Q. You read it in the paper, didn't you?

A. As I recall, there was nothing in the paper after that incident on the 14th of December until after I was sworn into office. I don't believe that I read it.

Q. Your testimony is that you read nothing about the incident in the paper between the 14th of December and the time that you took office? When was that, was that on the 14th?

A. I took office on the 12th of January and I don't recall reading it in the paper. It might have been in the paper but I don't recall reading it.

Q. But you knew about the incident?

A. Yes, on the street. Someone accosted me on

(Testimony of Melvin Alsager.)

the street and that was the first that I ever heard of it and that was after Christmas, I think, although I am not certain.

Q. You took office on the 12th of January?

A. Yes.

Q. And I believe that you told Mr. Clements that within 10 minutes after you took office this complaint was filed [184] against Mr. Estes?

A. Yes.

Q. Did you know that it was going to be filed?

A. I had no knowledge whatever.

Q. Now, up to this time had you ever discussed this incident with Mr. O'Donnell, the former prosecutor?

A. Just in passing, when we were moving some of the county supplies over to my office. It was not gone into as to the merits, it was just in passing.

Q. So you knew there was something brewing concerning the matter at the time you were moving your supplies from one office to the other?

A. Yes, I knew that there was something about but I knew nothing about the merits of the case whatever, we didn't even discuss that.

Q. Will you state whether or not you knew who prepared that complaint against Mr. Estes?

A. I didn't know at the time it was filed.

Q. Did you subsequently learn? A. Yes.

Q. When did you subsequently learn who prepared the complaint?

A. I think that it was Tuesday morning that I got a telephone call from an attorney at Lewiston.

(Testimony of Melvin Alsager.)

Q. By the name of Henry Felton?

A. Yes, Henry Felton. [185]

Q. When was Tuesday, would that be the 12th or the 13th? A. That was the 13th.

Q. And you took office on Monday the 12th?

A. Yes.

Q. At what time did you receive that call?

A. Well, it was before I had gone to the office in the morning and I usually go at nine, so it was before that.

Q. He called you at your home? A. Yes.

Q. And he advised you that he had prepared this complaint against Mr. Estes?

A. Yes, I got it from his conversation that he was the one who prepared it all right.

Q. And you got this information on Tuesday the 13th? A. Yes.

Q. When was the complaint filed?

A. It was filed on Monday, I don't know the exact time but it was between 2:00 and 2:30 sometime.

Q. When did you have the first conversation with Mr. Huff,—Mr. Laurence Huff, concerning this complaint? A. Monday afternoon.

Q. And isn't it a fact that on Monday afternoon Mr. Huff told you that Henry Felton had prepared this complaint against Mr. Estes?

A. I don't recall that, no. [186]

Q. Isn't it a fact that he talked to you about the preparation of this complaint by Mr. Felton on Tuesday the 13th?

(Testimony of Melvin Alsager.)

A. He may have talked to me about it at the Courthouse that morning or in my office, yes, he might have.

Q. I mean in your office?

A. He may have.

Q. Isn't it a fact that you told him that you would not tolerate the filing of a complaint by an attorney outside of your office, that you were the proper party to file that complaint?

A. I don't know whether I said anything in those words or substance. I know I was a little bit peeved that someone went around me without going through my office in the first instance.

Q. That is what I mean, and at that time you told him that you were not going to permit that, and that you were going to prepare a motion for dismissal, which I believe was Exhibit 11, here. Isn't it a fact that that conversation resulted in the writing up of this petition to dismiss?

A. I never said that I would prepare a motion at all. That was Mr. Huff's offer to me.

Q. When did you have that conversation with Mr. Huff?

A. I had two conversations with him, one on Monday afternoon and one on Tuesday [187] morning.

Q. And this document marked Exhibit No. 11 which was read to the jury, a motion for dismissal, you say that was prepared by Mr. Huff?

A. As far as I know, it wasn't prepared in my office at all, he brought it in to my office.

(Testimony of Melvin Alsager.)

Q. And you and he never discussed the contents of this motion, is that your testimony?

A. Monday afternoon he mentioned a motion to dismiss,—no, not the contents, I don't think that we ever discussed the contents of it.

Q. How did you happen to talk about a motion to dismiss on Monday afternoon when you didn't know that Henry Felton had prepared this complaint until Tuesday—when he called you on Tuesday?

A. Tuesday was the first time that I definitely knew that Henry Felton had prepared that complaint. I didn't know it before that time.

Q. Then why were you talking about the dismissal of this complaint on Monday afternoon with Mr. Huff?

A. Well, I don't recall on Monday afternoon of discussing Henry Felton in so many words. I don't recall that.

Q. You signed this document, did you not, Exhibit No. 11?

A. Yes, Tuesday morning.

Q. And you left it with Judge Martinson?

A. Yes, I brought it up there, that is [188] correct.

Q. And it was delivered to you when?

A. That was delivered to me on Tuesday morning by Mr. Huff, about 10:00 o'clock, I would judge.

Q. You read the contents of it?

A. Yes.

Q. And, of course, you would not sign a docu-

(Testimony of Melvin Alsager.)

ment that didn't represent what it says, over your signature, would you?

A. If you mean did I read it before I signed it, yes.

Q. Now, Mr. Alsager, this motion says as follows: "That the complaint in the above-entitled matter, apparently prepared by a private attorney, was filed in the above-entitled court on January 12, 1953." You knew that when you signed this document, didn't you?

A. Would you repeat those words again?

Q. Yes,—“That the complaint in the above-entitled matter, apparently prepared by a private attorney, was filed in the above-entitled court on January 12, 1953, in less than 10 minutes from the time when the undersigned was sworn into the office of Prosecuting Attorney of Latah County.” That is correct, isn't it?

A. That is correct.

Q. “It appears from such complaint that the alleged incidents upon which such complaint arose occurred on December 14, 1952, approximately one month prior to the date of the filing of the complaint.” That is correct, isn't it? [189]

A. That is correct.

Q. “The undersigned was not consulted by the complaining witness or any person on his behalf either before or since such complaint was filed.” That is correct, is it?

A. That is correct.

Q. “That the matter was investigated by J. M. O'Donnell, the undersigned's predecessor in office, and Mr. O'Donnell was unable to find any evidence

(Testimony of Melvin Alsager.)

whatsoever about which to base a felony charge, nor did the complaining witness ever request Mr. O'Donnell to file a felony complaint." Is that correct?

A. Yes, I believe that is correct.

Q. Mr. O'Donnell had been Prosecuting Attorney in this county for 10 years prior to your taking over the office, hadn't he?

A. Yes, I believe 10 years.

Q. And did you believe that, Mr. Alsager?

A. Well, he had done nothing with the case from December 14, until I took office.

Q. There never was anything done about any felony charge against Mr. Estes, concerning the State of Idaho and Mr. Estes and Mr. Shoup, was there?

A. There was nothing done, if that is what you mean; there was nothing done about anything. [190]

Q. When you filed a complaint or caused one to be filed it was on a charge of battery and not assault with a deadly weapon, was it?

A. I never filed the original complaint in this matter. That was filed by a private citizen, and it was assault with a deadly weapon.

Q. I am talking about Mr. Shoup; we are talking about Mr. Shoup now. This is the State of Idaho vs. Murray Estes, in which Shoup was assaulted. I say, you never did prepare a complaint against Mr. Estes charging him with assault with a deadly weapon as against Shoup? A. No, I did not.

Q. So that this complaint that was filed on the 12th in Judge Martinson's Court was apparently

(Testimony of Melvin Alsager.)

when you made the statement that there was nothing to the merits of that case and that was apparently right, wasn't it?

A. I had never consulted the witnesses up to that time, in fact, I had never met Mr. Shoup.

Q. And even after you met him, you didn't file another complaint charging him with assault with a deadly weapon, and I am referring to Mr. Estes, because you charged him with a battery?

A. No, in the second instance I charged Mr. Estes with assault with a deadly weapon against Mr. Greene, after checking all the witnesses. [191]

Q. I am talking about Mr. Shoup now, we will get to Mr. Greene later on. You never did file a complaint against Mr. Estes charging him with assaulting Shoup with a deadly weapon, did you?

A. You mean personally did I file one or anyone else?

Q. There was a battery charge filed against Mr. Estes, subsequently so that this statement that you signed, this paragraph that I read from, over your signature, that is correct, isn't it?

A. It is substantially correct.

Q. Now, lets move to the next one here. "The undersigned is informed and believes that the complaint was filed herein as a foundation for a civil action." You believed that, didn't you?

A. I knew that because I had talked to Mr. Felton in the morning and I could see the drift of the thing, there was no doubt about it. I had talked to Felton, that transpired between the meeting with

(Testimony of Melvin Alsager.)

Mr. Huff and this document. I talked to Mr. Felton on the telephone and——

Q. And Mr. Felton told you that he was going to bring suit against Mr. Estes in a civil action?

A. I don't believe that he mentioned that in the telephone conversation, no.

Q. But you arrived at the conclusion, after talking with him [192] over the telephone that a civil action would be filed against Mr. Estes as a result of this incident on December the 14th in the Perch, is that right?

A. Well, I was a little perturbed at Mr. Felton because of his coming through the back door, so to speak, and putting me on the spot in this manner. It wasn't a very friendly conversation with Mr. Felton, if that is what you mean, and in general I got the impression that there was something underhanded going on that I wasn't quite aware of but he never told me that he was going to file a suit, a civil action, he never told me.

Q. But you were convinced of that, were you not, that is, that there was something underhanded going on?

A. I reasoned after talking to Mr. Felton that there was something funny about the whole thing, there is no question about that.

Q. And the complaint was worded in such a way that it didn't exactly charge him with assault with a deadly weapon. In other words, there was a lot of superfluous language in it?

A. Yes, and that is primarily the basis for this

(Testimony of Melvin Alsager.)

thing. I had studied the complaint by this time and I hadn't studied the complaint at all at the time when Mr. Huff came in. I realized that the complaint that was filed was all fouled up. There were two or three crimes in the one complaint and it was just a bad complaint. [193]

Q. And that is why you told Laurence Huff that you would not appear and that this motion for dismissal should be filed?

Mr. Clements: Just a minute, I don't believe that the witness has so testified.

Mr. Tonkoff: This is cross-examination, your Honor, and certainly I am not going to ask a question on a matter that I cannot substantiate by Mr. Huff at a latter time.

The Court: You may go ahead.

A. Would you let me have that question again?

(Question read by reporter.)

A. On the contrary, I never told Mr. Huff that I would not appear, I told him that I would appear.

Q. You told Mr. Huff definitely that you would appear at the time that you signed this motion for dismissal prepared by him?

A. No, not at that time, it was on the following day, I believe.

Q. You mean that you——

A. I don't recall saying that I wouldn't appear at that meeting with Mr. Huff, I don't recall that at all, any statement that I would not appear

(Testimony of Melvin Alsager.)

if a hearing was held. I don't believe that we even discussed that matter.

Q. Did Mr. Huff request you to sign this motion for dismissal?

A. Not only that, he persuaded me to sign [194] it.

Q. You mean that he persuaded you against your better judgment?

A. Not exactly, I never had talked to the complaining witness—it was a complaint that was bad in the first instance. I just wanted to be in on the ground floor and start the thing myself. I didn't like the looks of the entire thing and that was kind of the basis for this whole thing here.

Q. I can understand that, Mr. Alsager, but the point is,—you intended to dismiss this case brought in Judge Martinson's Court on the complaint prepared by Henry Felton out of Lewiston, is that right?

A. I had that intention in my office but when I got up to the Courthouse I had a change of mind and I——

Q. When you got up to what Courthouse?

A. Up to the Probate Judge there and we talked it over for some time and when it got down to tendering or filing this particular document I said that it was not to be filed and to my best recollection it was never filed but I never took it back, but we never filed it.

Q. Why did you leave it with Judge Martinson if you didn't intend it to be filed?

(Testimony of Melvin Alsager.)

A. Well, we left it in this way, I told Judge Martinson not to file it and I told him not to do anything with that document until he heard from me further and, of course, I didn't pick it up and carry it with me. It was laying on Judge Martinson's desk, but I specifically instructed him not to file it. [195]

Q. Mr. Alsager, knowing that there was a defective complaint filed against this man charging him with assault with a deadly weapon, certainly you would not proceed to trial on such a complaint, would you?

A. That is the reason that I subsequently filed one myself.

Q. But you would have to dispose of the complaint that was then on file by way of a dismissal, wouldn't you?

A. If you were going to charge the same individual, possibly, but I changed it around to suit the facts of the situation.

Q. The question is this, you would not go to trial on that defective complaint and you would dismiss it, wouldn't you, before you would go to trial and you would file another case, wouldn't you?

A. I didn't like the complaint, if that is what you mean.

Q. Yes, and being a lawyer and being elected as prosecutor in this county, you wanted to proceed on proper complaints, didn't you?

A. Well, I always like to be on the ground floor to begin with so I know where I am going because

(Testimony of Melvin Alsager.)

once something like this is filed I am responsible for carrying the ball thereafter. I could see many difficulties in this thing, in other words, I was getting a back start here instead of being on the ground floor.

Q. You are absolutely right, so in order to get on the ground floor it was necessary to dispose of and to dismiss this [196] complaint that was prepared by Henry Felton of Lewiston and to start on the ground floor and start over again, wouldn't you?

Mr. Clements: I will object to that, your Honor; it is argumentative.

The Court: It is very apparent to the Court that the witness was a very young practitioner, that he had just started out to practice law. Of course, I think that he took an examination to admit him to practice but the attorney who is examining him is an older and experienced attorney and there might have been some matters of law that this witness did not know about at the time that he first started out as Prosecuting Attorney. I don't know as I could stand up under a cross-examination as to what the law is. I think it is very apparent that the witness is trying to do the very best that he can and I don't think that you should examine him as to his knowledge of the law.

Mr. Tonkoff: Your Honor, I am not examining him as to his knowledge of the law. The question is wouldn't he have to dismiss that defective complaint

(Testimony of Melvin Alsager.)

which he has said was defective, that is the question, what he would do.

The Court: It is very apparent that he got all of his information from Mr. Huff and he acted on the information that he got from Mr. Huff. He was being advised [197] by a very able attorney, one of the ablest attorneys in the state,—he was young and had only been in office a few hours at that time. I think this examination is going a little bit beyond the bounds of reason, but you may go ahead.

Q. Mr. Alsager, Mr. Huff said here that he was the Dean of the bar, the oldest member of the bar, is that right?

A. Yes, he is the oldest member, the oldest one admitted to the bar, that is to the bar association that we have here.

Q. And there is no doubt about his veracity or integrity, is there? A. No.

Q. Mr. Alsager, after you went up to the Probate Court, was that on the 13th?

A. That would be on the morning of the 13th, yes.

Q. Was Mr. Huff present with you?

A. I believe that we went up together, whether we went in my car or in his I am not certain, but we went up there together.

Q. Did Mr. Huff hear all of the conversation between yourself and Judge Martinson?

A. Yes, he was present right there in the same room, we were all right there.

Q. And up to that time had you told him that

(Testimony of Melvin Alsager.)

you were not going to appear at this hearing?

A. I don't believe that there was any talk about appearance at [198] all up to that time. I mean about appearance, there was no talk about it.

Q. Did you ever tell him that you were not going to appear?

A. Well, the following Wednesday during the noon hour or after lunch, I went and told him that this case was not going to be dismissed and that I would appear at the hearing, that was the following day.

Q. That was the 14th?

A. Yes, sir, on the next day.

Q. Now, when you were up to Judge Martinson's office on the 13th, this case was set for hearing for nine o'clock on the 15th, wasn't it?

A. I believe that it had been set at that time, yes, I believe so.

Q. And you knew that, didn't you?

A. Yes, I believe that I knew it.

Q. And you knew that the hearing was set for nine o'clock on the 15th, at Judge Martinson's at the Courthouse, didn't you?

A. It was set in the Probate Judge's office, I believe.

Q. That is at the Courthouse?

A. Yes, at the Courthouse.

Q. Have you ever attended any of those preliminary hearings during your practice?

A. Well, I tell you, I think——

(Testimony of Melvin Alsager.)

Q. Prior to the time that you were elected [199] Prosecutor?

A. I think that I attended probably one, yes, I think I attended one.

Q. And that was at the district Courthouse, wasn't it? A. Yes.

Q. You and Mr. Huff met, you say, at your office? A. Yes.

Q. At that time did you examine Section 312604 of the Idaho Code with Mr. Huff?

A. I can't recall what books we examined, I don't remember just what we examined.

Q. Isn't it a fact that Mr. Huff and you read that section and in that section it is provided that you are not required to appear before the Judge. Do you remember reading that section?

Mr. Clements: What was the number of that section?

Mr. Tonkoff: 312604.

The Court: There is no such section.

Mr. Tonkoff: 31-2604, your Honor.

The Court: That section says that he is to appear when called by the Judge that is hearing the case. If the Judge wants the Prosecuting Attorney to appear, he calls him.

Q. I will merely ask, did you read that section?

A. We may have read it that morning, but I was familiar with that [200] section before this whole thing started, if that is what you mean. That is the reason I went over to Borg when he had not called me for two or three hours and I went over to Borg's

(Testimony of Melvin Alsager.)

specifically to ask if he was going to call me, and and to tell him that I was going to be present whether he called me or not.

Q. You went to see Judge Borg when, on the 14th?

A. Yes, that would be Wednesday afternoon on the 14th.

Q. At that time and place did you tell him that this was a hot potato, referring to the Estes case, or did you in words of similar import?

A. I don't believe I told him that, he may have told me, but I didn't tell him that.

Q. Was that language spoken either by you or by him at the Elks Club, on the afternoon of the 14th, when you saw him?

A. He may have spoken that, yes, he may have said that but I didn't say that.

Q. You didn't say anything about that?

A. No, I didn't say anything about a hot potato myself, no.

Q. Did you tell him that the law provided that you didn't need to appear, that you didn't have to appear, did you tell him that?

A. Well, in words and substance, I asked him if he was going to call me and he said no, and I told him, I said I am [201] going over there, I am going to appear.

Q. And you told Judge Borg on the evening of the 14th, that you were going to appear at this hearing? A. Yes.

Q. Then why did you call him at eight o'clock on

(Testimony of Melvin Alsager.)

the following day to advise him that you were going to appear?

A. I wanted to make certain that we were not going to have any mixup on this thing.

Q. What made you suspicious that there might be a mixup in this thing?

A. I wasn't suspicious at all, I just called him up to advise him, to remind him that I was going to be there.

Q. You did that at eight o'clock in the morning at his home? A. Yes.

Q. The Police Station is quite small, about twice the size of this dais (indicating). I think that is the way it was described. Would that be about right as to the area?

A. Well, it is probably a little bigger than that; yes, I believe it is.

Q. It had two desks in it? A. Yes.

Q. One was about four by six and the other about a three by four or at least a three by four?

A. Yes, I would say so.

The Court: We will adjourn at this time [202] until 2:00 o'clock this afternoon.

April 7, 1954, 2:00 P.M.

The Court: The jury are all present, you may proceed.

Q. Mr. Alsager, I think that I asked you before the recess about the size of the Police Courtroom, and you said that it was a little larger than twice

(Testimony of Melvin Alsager.)

the size of the dais where the jury is, is that right?

A. Yes, I would say so.

Q. And there are seven chairs in there, is that about right?

A. Well, there are some stationary chairs, that would be about right, I believe, some of the chairs are up against the wall, stationary chairs.

Q. And that is not adequate to hold a preliminary hearing, due to its size, is it?

A. I would not say that, of course, if the interest in the case is great there would possibly not be enough room, but normally with just a witness or two and the parties then it would be big enough, yes.

Q. But you do know that if there are a lot of witnesses then there isn't sufficient room?

A. There is room for a considerable number of witnesses. [203]

Q. About how many?

A. Well, of course, all of the witnesses would not have to be in there at the same time.

Q. The point is, it wasn't adequate to hold the second preliminary hearing and that is the reason you transferred it up to the Courthouse, isn't that right?

A. That is correct, but, of course, there was a lot of publicity between the first one and the second one. Several people who didn't attend the first one certainly were at the second one.

Q. You had nine witnesses yourself at the first one, didn't you?

A. That is correct.

(Testimony of Melvin Alsager.)

Q. And yourself, that would be ten, and of course you assumed that Mr. Estes and his lawyer would be there? A. Yes.

Q. And that room wouldn't be sufficient for a hearing of that kind, it would be more adequate to hold it at the Courthouse, the district courtroom, would it not?

A. It could be held there, yes.

Q. You stated that you came back to the Police Station about 15 minutes after nine, did you?

A. I said that I came back to the Police Station.

Q. Perhaps I am not making myself too clear. After you picked up a stenographer at the University, you say that you picked up this stenographer about 10 minutes to nine? [204]

A. That is correct.

Q. And that was up at the University?

A. Yes, well, I really picked her up in the West Six Village. That is where I had to go to pick her up.

Q. How far is that from the Police Station?

A. I don't know. I am a poor judge of distance, but it might be a half mile, I guess it would be about a half mile, I know that it is in the city limits.

Q. I am not familiar with this town, would that be east or west, the University?

A. That is west.

Q. Who was this stenographer?

A. Well, the name slips my mind at the moment.

Q. Did you know her before this time?

A. No, it was someone that was given to me by

(Testimony of Melvin Alsager.)

the Personnel Department at the University. I had never seen her before in my life.

Q. As a matter of fact you didn't hire a stenographer, you didn't hire Mr. Tunnicliff to report the case, did you?

A. I called Mr. Tunnicliff prior to that time and he informed me that he would be out of town and would not be able to report it.

Q. As a matter of fact didn't you tell Mr. Tunnicliff that you didn't know that you were required to have a stenographer there. Did you ever make that statement to Mr. Tunnicliff? [205]

A. I don't believe that I made that statement, no, sir.

Q. Mr. Clements called you in connection with this case, didn't he?

A. He gave me a phone call once, yes, sir.

Q. Did he tell you anything about dismissing it because Henry Felton was involved in it?

A. No, no, all that he said was that if I needed any help he would be glad to help me in it.

Q. Give you some help against Mr. Estes?

A. He didn't say for or against, all he said was that if you need any assistance you can feel free to call on me and, as I remember, that was nothing more said about it, nothing was discussed in regard to the merits of the case.

Q. What date was that,—refreshing your recollection, wasn't it the same day that you filed this motion of dismissal or left it with Judge Martinson?

(Testimony of Melvin Alsager.)

A. To tell you the truth I don't just remember which day that was that I received that phone call. I received so many phone calls during that time that I would not say exactly when I received that particular call, whether it was that day or some other time.

Q. You say that you received a lot of phone calls in connection with that matter on that day?

A. Well, I had the newspapers calling me and many people calling me, there seemed to be an unsurmountable number of [206] calls coming into me, to my home and to my office.

Q. And did you tell the newspapers that this complaint was faulty and that it contained three charges and should have contained but one and that you were going to dismiss it? A. No.

Q. What did you tell them?

A. I don't know what I did tell them exactly.

Q. What did they inquire?

A. Well, they were inquiring about what happened.

Q. As a matter of fact, Mr. Alsager, you could have filed a complaint the very same day that it was dismissed, a proper complaint, you could have filed it with Judge Borg, couldn't you?

A. I could have but I had never consulted the witnesses, I had never seen the complaining witness and I had no basis to go on other than the complaint itself and I wanted to have a chance to interrogate the plaintiff or complaining witness and so on.

(Testimony of Melvin Alsager.)

Q. You hadn't consulted the complaining witness, you say?

A. Which day are you talking about now?

Q. The first day, the 15th?

A. Well, you see, I never talked to this boy Shoup, until the following Wednesday and I wasn't going to file another complaint or to prepare one without talking to him.

Q. You had talked to him on the evening of the 14th because you [207] told Judge Borg, you say, that you were going to appear the next morning, according to your testimony. Certainly you had talked to him on the evening of the 14th, hadn't you, Mr. Alsager?

A. I talked to Mr. Shoup for the first time on Wednesday, the day of the scheduled hearing.

Q. At any rate you didn't file a complaint the next day or the next day nor the following day, you never did file another complaint against Mr. Estes for assault with a deadly weapon, did you?

A. Yes, I did, the following Sunday I filed a charge of assault with a deadly weapon.

Q. In which Shoup was the complaining witness?

A. I filed that myself.

Q. The question is, Mr. Alsager, you never did file a complaint charging Mr. Estes with assault with a deadly weapon, where Shoup was the complaining witness, did you?

A. No.

Q. Did you ever have a conversation with Mr. Estes in your office about the 13th of January?

A. I don't know whether it was that day or not.

(Testimony of Melvin Alsager.)

We had one meeting in the office where Mr. Huff was along with him, is that the one you mean?

Q. No, sir, Mr. Estes was alone, on the evening of the 13th? [208]

A. I believe that Mr. Estes was trying to get a hold of me all of that day.

Q. The question is did you have a conversation with him at your office on the evening of the 13th, at 7:00 o'clock?

A. I don't believe so, I think the first conversation I had was on the telephone at home. I think he called me and I talked to him at home, but I don't think that I talked to him personally at my office prior to that time, as far as I can recollect now.

Q. Your office is across the street from him, upstairs? A. Yes.

Q. Did you ever have a conversation with him prior to this hearing at your office in the building across the street?

A. A telephone conversation that he called.

Q. Now, the question is did you have a conversation with him in your office? You either did or didn't.

A. I do not recollect whether I did or not. I cannot say that I didn't and I wouldn't say that I did.

Q. Did you at any time over the phone or personally prior to January the 15th, either on the phone or in your office, tell Mr. Estes that you were not going to appear and that you were going to dismiss this case?

(Testimony of Melvin Alsager.)

A. I do not believe so. I do not believe so, no.

Q. Did you ever tell anybody that you were going to dismiss this case prior to the hearing on January 15, 1953? [209]

A. I don't recall that I told anybody that I was going to dismiss it other than this motion-to-dismiss business, I don't believe so.

Q. Did you ever tell Mr. Huff, that?

A. No, only this motion that he brought over to me, only in that sense.

Q. Isn't it a fact that when you left this motion with Judge Martinson in his office that you told him that you intended for him to file it, that was on the 13th, I believe?

A. When I left that in his office Mr. Martinson asked me specifically, "Are you tendering this for filing?" And I said, "No, you are not to file that piece of paper or to do anything more until I inform you about it." And to the best of my recollection it was never filed.

Q. Did you see Judge Martinson the following day, the 14th?

A. That would be Wednesday, is that correct?

Q. Yes, I assume that is right, yes, Wednesday.

A. I don't know that I saw him personally, but he called me on the phone and told me that he was disqualifying himself, or had disqualified himself.

Q. And he told you to come up and get this motion to dismiss and take it out of his office, did he not?

A. Do you mean at the time that he called me?

(Testimony of Melvin Alsager.)

Q. That is what we are talking about, the 14th?

A. You mean at the time that he called me about that he had [210] disqualified himself?

Q. I assume so if that was the 14th.

A. You mean in that same conversation?

Q. I don't care what conversation, at any time, on the 14th did he——

The Court: Now, there is no use of getting fussy about this, just take it quietly and be calm. You have a witness here on the stand and just go ahead and examine him.

Q. Did you at any time on the 14th, either at the time of that telephone conversation or any other, were you advised by Judge Martinson to come up and get this dismissal, this Exhibit No. 11?

A. I don't think so, I don't recall that.

Q. Did you go up there and pick it up from Judge Martinson's office on the 14th?

A. To the best of my recollection I never did pick up that original copy, no.

Q. Did you send anybody up for it?

A. No.

Q. Did you ever have it in your possession after you left it at Judge Martinson's office?

A. I don't believe I ever did. I was never able to find that original and I don't believe that I ever went up and got it. [211]

Q. Where did you get that copy?

A. Well, that was left with me that morning. When Mr. Huff came over he had copies made and

(Testimony of Melvin Alsager.)

he left a copy with me and we left a copy in my office before we went up to the Courthouse.

Q. And this was not done on your typewriter?

A. No, that was not even done in my office at all.

Q. Now, Mr. Alsager, going back to the time that you say you picked up the stenographer, whose name you don't remember and went back to the Police Station, what time did you arrive at the Police Station?

A. To the best of my recollection it would be between five minutes to nine and nine o'clock, along in there some place.

Q. Where were your witnesses at that time?

A. They were standing right there at the Police Station.

Q. When you went in there what did you do?

A. Well, I went in and looked around immediately, and, of course, thinking to see the other side there, and not seeing the Judge or any of the other parties there, I immediately called the desk clerk there and tried to find Mr. Borg on the telephone. I asked her to do that, which she started doing.

Q. Did you call his home?

A. I didn't call at all.

Q. Did she call his home?

A. Yes, I think she did. I think she called his home. Of course, [212] I didn't do any calling personally, but I think she called his home, although I don't know.

Q. What time was it when you saw him down at the Police Station?

A. You mean Mr. Borg?

Q. Yes.

(Testimony of Melvin Alsager.)

A. I would say that it might have been 9:15.

Q. You arrived there from five minutes to 9:00 until 9:00 o'clock, between five minutes to 9:00 and 9:00, and you had to get him at the Courthouse and then I assume that he walked down, you saw him walk down?

A. I have no knowledge whatever as to how he got there.

Q. But your best recollection, I assume, is that he got there at 9:15? A. That is right.

Q. Now, isn't it a fact that you made a call to Wynn Blake, the Prosecuting Attorney at Lewiston, Nez Perce County, on the 14th day of January, 1953?

A. I may have made a call. I don't recall it necessarily, but then it may have been, although it doesn't stand out in my mind at this time, I may have.

Q. And you called him for the specific purpose of getting information concerning this Estes case?

A. I may have called him, yes. I don't recollect it exactly now. [213]

Q. Your testimony is that you may have called him? A. Yes, I don't deny that I called him.

Q. For what other purpose would you call him except about this Estes case, that is, on January the 14th?

A. If I did call him, it may have been in connection with this case. Blake and myself call back and forth here in the last year and a half, we consult

(Testimony of Melvin Alsager.)

one another on different matters here, but it may have been in connection with this case all right.

Q. Did you consult with him in relation to this case? A. I may have, yes.

Q. Do you remember the advice that he gave you?

A. Well, of course, I don't even remember my conversation with him.

Q. Do you have any distinct recollection of your conversation with Mr. Clements?

A. Only to the extent that I told you about, yes, that is all.

Q. Isn't it a fact that Mr. Blake told you that Henry Felton had prepared this complaint and for you to ignore it?

A. I don't recollect that, no.

Q. Do you recollect any of the conversation?

A. No, I do not, not even my own conversation.

Q. How do you recollect the conversation so clearly with Judge Borg in the Elks Club, at five o'clock on January the 14th, that you have testified about? [214]

Mr. Clements: We object to that as being argumentative.

The Court: Well, counsel is making quite an effort here to see if he can mix this witness up. I will let him go. I don't know whether counsel has ever been on the witness stand or not, but I have and I know that it is a pretty hard thing to contend with a lawyer sometimes when you are on the stand.

(Testimony of Melvin Alsager.)

Mr. Tonkoff: I just got off the witness stand last week, your Honor, and I think I should have an A for effort.

The Court: You just go after him as hard as you want to.

Mr. Tonkoff: That isn't the point of this cross-examination at all, your Honor.

The Court: That is the way it appears to the Court.

Q. Who did you hire to take the notes at that second hearing?

A. I called Mr. Tunnicliff and asked if he would be available to take it and he said he would.

Q. Did he take it? A. Yes, he did.

Q. Isn't it a fact that Mr. Estes hired him and paid him to take that testimony?

A. Mr. Estes may have hired him too, as far as I know. I didn't [215] hire him; I called him and asked if he would be available. That is all I had to do, was to ask him if he would be available to take the testimony, and he assured me that he would be and that is as far as I went on the thing.

Q. But he was there?

A. Oh, yes, he was there.

Q. Did you ever pay him, I mean did the county pay him for his service?

A. There was no bill ever presented to the county by Mr. Tunnicliff, because that would have to be okayed through my office, and to the best of my recollection there was no bill presented by Mr. Tunnicliff.

(Testimony of Melvin Alsager.)

Q. Do you recollect of having a second motion for dismissal prepared?

The Court: Aren't we going back over the same questions that were asked here this morning? It seems to me that we are rehashing the same thing over and over, and in the interest of time I don't think that it is necessary to repeat all of this.

Mr. Tonkoff: I am inquiring about the second motion to dismiss, and this is the first time I have asked about it.

The Court: It seems that I remember that you asked him about the second motion to dismiss, but you may ask him again. [216]

Mr. Tonkoff: If I did I don't have any recollection of it.

Q. Do you remember, Mr. Alsager, have you testified anything about a second motion for dismissal up to this time, yesterday or any time up to this time?

A. Well, I don't believe so, no, I don't think I did.

Q. Can you tell us anything about this second motion for dismissal that was prepared?

A. Frankly I don't know what you are talking about, I cannot place it.

Q. You have no recollection of a second motion for dismissal, such as Exhibit 11 here, being presented to you by Mr. Huff?

A. No, I believe that is the only one that was presented to me.

Q. Now, you caused a complaint to be issued on

(Testimony of Melvin Alsager.)

the 17th of January, did you not, charging Mr. Estes with a second felony against Greene?

A. Yes, I believe that is the date.

Q. That was Saturday the 17th?

A. I believe it was Sunday.

Q. You had him arrested on Sunday and brought down to the Police Station, or caused him to be arrested?

A. Yes. [217]

Mr. Tonkoff: I think that's all.

Redirect Examination

By Mr. Clements:

Q. Referring to the complaint, the first charge against Mr. Estes that is referred to as having been prepared by Henry Felton of Lewiston, prior to the time that case was dismissed, had there been served upon you by Mr. Estes or his attorneys any demurrer to the complaint, or any motion to quash it, or any legal paper that attacked the sufficiency of the complaint?

A. No.

Mr. Clements: That's all.

Recross-Examination

By Mr. Tonkoff:

Q. Mr. Alsager, isn't it a fact that Mr. Estes offered to submit a motion or to approve an order reopening the case and going on with the hearing that was dismissed on January the 15th, by Judge Borg?

(Testimony of Melvin Alsager.)

A. He called me and told me that he would be willing to have that hearing taken and that he would appear at a time and place that I would set to hear the case.

Q. In other words, he offered to apply or have you apply to the Court to set aside the motion for dismissal and to go ahead as though a dismissal had never been made or entered in the [218] case and to go right ahead with it?

A. He called me at my home and made that offer, that is correct, yes.

Mr. Tonkoff: That's all.

Mr. Clements: That is all.

PEGGY DAVID

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Clements:

Q. Will you state your name for the record, please? A. Peggy David.

Q. Where do you reside?

A. Moscow, Idaho.

Q. And how long have you lived here, Mrs. David? A. 27 years.

Q. What is your present business or occupation?

A. Cashier-clerk, for the the Washington Water Power Company.

Q. How long have you been in the employ of

(Testimony of Peggy David.)

that company? A. Since November 14, 1953.

Q. Were you ever employed by the Moscow Police Department? A. Yes.

Q. Were you so employed on or about January 15, 1953? A. Yes, sir. [219]

Q. How long had you been employed prior to that time?

A. Since January, either 1949 or 1950.

Q. In what capacity were you employed?

A. Desk sergeant and police clerk.

Q. During that time did you become acquainted with Justice of the Peace John Borg?

A. Yes, sir.

Q. And during that time did the Justice of the Peace John Borg transact any business in the Police Station? A. Yes, sir.

Q. Did he, during that time, hold any hearings in the Police Station in regard to criminal matters prosecuted by the State of Idaho?

A. It seems to me that he did, but I can't say for sure.

Q. Do you recall any incident where Mr. Alsager or Mr. O'Donnell had any hearing before Judge Borg at the Police Station?

A. Yes, sir.

Q. Do you have any knowledge of the character of the charge, whether it was a misdemeanor, whether it was a state charge or whether it was a violation of city ordinance?

A. It was a violation of the Green River Ordinance which comes under the State statute. Mr.

(Testimony of Peggy David.)

O'Donnell was the Prosecuting Attorney and Mr. Alsager was the defense attorney.

Q. Were you employed and were you at the Moscow Police Station on the morning of January 15, 1953? [220]

A. Yes, sir.

Q. Do you recall Mr. Alsager coming into the Police Station that morning?

A. Yes, sir.

Q. Was there many people in the Police Station prior to Mr. Alsager's arrival?

A. Yes, sir.

Q. Are you now or were you acquainted at that time with a boy named Richard Shoup?

A. I was not acquainted with him. I met him that morning.

Q. Was he in the Police Station that morning?

A. Yes, sir.

Q. What time did he arrive?

A. I would say about 8:30.

Q. And was there other people in his company?

A. Yes, sir.

Q. About how many were there?

A. I would say about 8 or 9.

Q. What time on that morning did Mr. Alsager arrive at the Police Station?

A. I would say it was between 10 minutes and 5 minutes to nine, that is the way I remember it.

Q. You had no occasion to clock or record the time?

A. No.

Q. Did he make any request of you to assist him in trying to [221] locate Justice Borg?

A. Yes, he came to the desk and asked if I would attempt to call Judge Borg.

(Testimony of Peggy David.)

Q. And did you? A. Yes, I did.

Q. Where was the first place you tried to call him? A. I called his residence.

Q. And what were you informed?

A. That he was not there.

Q. And did you call any other place?

A. Yes, I called the District Court and I received no answer,

Q. Did you make any other attempt after that?

A. Yes, sir. I called Judge Martinson's office because I could not get anyone at the District Court and Judge Martinson advised me that both Mr. Tunnicliff and Judge McQuade were out of town, therefore, I asked him if he——

Mr. Tonkoff: Now, we will object to this as hearsay.

The Court: She may answer.

A. Judge Martinson advised me that they were both out of town and I asked him if any arrangement had been made with him—I informed him first that I was trying to contact Judge Borg, and I asked him if they had made any arrangement with him to use his courtroom, which I didn't know at that time was the same as the District Court, and he said that no arrangement [222] had been made with him, and so then I called the sheriff's office.

Q. And who did you talk with at the sheriff's office? A. With deputy Hill.

Q. What did you say to him?

A. I informed him of the same thing, that I was trying to contact Judge Borg in regard to the Estes

(Testimony of Peggy David.)

case, and that Mr. Alsager and the witnesses were present at the Police Station, and if he could get hold of him, would he please ask him to come to the Police Station.

Q. Did he later call you back?

A. Yes, he called me back to tell me that Judge Borg would be down right away.

Q. Did you see Judge Borg arrive at the Police Station that morning?

A. Yes, sir, I did.

Q. To the best of your knowledge, what time would you say it was, at the time of his arrival?

A. Between 15 and 20 minutes after nine.

Q. Did you hear any conversation between he and Mr. Alsager? A. No, I didn't.

Mr. Clements: That is all. [223]

Cross-Examination

By Mr. Tonkoff:

Q. I assume that you talked this over with opposing counsel before you took the stand?

A. Yes, I did.

Q. How did you happen to remember that it was 15 minutes after 9:00?

A. We have a practice at the Police Station of logging all of the times of all telephone calls and so forth and I got quite in the habit of doing it.

Q. Do you have that log of the calls that you made? A. No, sir, I don't.

Q. Who does have it?

(Testimony of Peggy David.)

A. We do not log outgoing calls; we log the incoming calls.

Q. And do you log the time, too?

A. We log them as to who calls, the time and the nature of the call.

Q. Did you log the time when Judge Borg arrived?

A. No, sir; I said that I believed that he arrived there between 15 and 20 minutes after 9:00.

Q. And that is your best recollection?

A. Yes, sir.

Mr. Tonkoff: That is all, thank you.

Mr. Clements: That is all. [224]

E. D. HILL

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Clements:

Q. You have stated your name; it is E. D. Hill?

A. Yes, sir.

Q. Do you hold any official position, if so, what official position do you occupy relative to Latah County?

A. The Marine Corps.

Q. I think that you misunderstood my question—do you hold any official position in Latah County, Idaho?

A. Yes, sir.

Q. What is that position?

(Testimony of E. D. Hill.)

A. Deputy sheriff.

Q. Were you a deputy sheriff or were you employed by the sheriff's office on the morning of January 15, 1953?

A. Yes, sir.

Q. Are you acquainted with Peggy David?

A. Yes, sir.

Q. What occupation was she engaged in on that day?

A. You say what occupation was she occupying?

Q. Yes.

A. She was in the employ of the Police Department of Moscow, Idaho. [225]

Q. Did you receive a telephone call from her on the morning of January 15, 1953?

A. Yes, sir.

Q. What was the nature of that call?

A. She called in regard to if I had seen Judge Borg.

Q. Did she leave any other message?

A. Yes; I told her that I had and she asked if I would see if I could contact him and tell him that Mr. Alsager and his witnesses were at the Police Station waiting for him.

Q. Did you make an endeavor to contact Judge Borg then?

A. Yes, sir; I did.

Q. And did you make contact with him?

A. Yes, sir.

Q. When and where?

A. At the Courthouse, at the bottom of the stairs at the landing—the District Courthouse.

Q. And what did you advise him?

A. That the Police Station had called and asked

(Testimony of E. D. Hill.)

me to give him the message that Mr. Alsager was waiting for him there.

Q. Who was with Mr. Borg at the time you met him?

A. As I recall, there was Mr. Estes, Mr. Felton, the newspaper reporter, and two or three others that I didn't know.

Mr. Clements: That is all.

Mr. Tonkoff: No questions.

The Court: Mr. Hill, I might tell you [226] that you got off easy.

FRED CASSIN

called as a witness by the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Greene:

Q. You stated your name to the Clerk, did you, Mr. Cassin? A. Yes.

Q. Where do you reside?

A. Niagara Falls. New York.

Q. Where did you reside in January of 1953?

A. Moscow, Idaho.

Q. What were you doing at that time?

A. At that time I was a reporter for the Daily Idahonian.

Q. How long before January 15, 1953, had you been a reporter for the Daily Idahonian?

A. Two years.

Q. And did you have any assignment of any

(Testimony of Fred Cassin.)

particular type of news that you covered for the *Idahonian*?

A. Yes, I covered most of the court business, some of the police business and all of the county government.

Q. Did you cover all of the original Murray Estes occurrences in January of 1953?

A. Yes, sir; I did. [227]

Q. I call your attention to exhibit marked No. 10 and admitted in evidence in the proceeding and I will ask you if you recall writing that story?

A. I don't believe I did.

Q. You didn't; were you familiar with the story at the time it was published in the paper?

A. Yes, sir; I was.

Q. Were you acquainted with Judge Borg?

A. Yes.

Q. And did you cover matters connected with his court?

A. I had reported some matters connected with his court.

Q. Did you cover the matter of the preliminary hearing at the Courthouse in the matter of the State of Idaho vs. Murray Estes on January 15, 1953?

A. Yes, sir; I did.

Q. Who instructed you there at the newspaper to cover that hearing?

A. Well, Mr. Boas did, but it wasn't necessary because it would ordinarily be on my beat in my regular job.

(Testimony of Fred Cassin.)

Q. Did you have any contact with Judge Borg prior to the time of the hearing?

A. Yes; I called Judge Borg—you mean that day?

Q. Yes.

A. I called Judge Borg that morning about a quarter past eight and I asked where the hearing would be if it would be held [228] and what time.

Q. Where did you contact Judge Borg at that time? A. At his home.

Q. How did you happen to call him?

A. I came to work and I was planning to go to the hearing and Mr. Boas, my editor, asked me where the hearing would be and I said that I believed at the Police Station and Mr. Boas said you better make sure and I called Judge Borg to make sure.

Q. Did you go to the Courthouse?

A. Yes, sir.

Q. About what time did you arrive there, at the Courthouse?

A. I should say about a quarter to nine.

Q. Where did you go after you arrived at the Courthouse?

A. I believe I went to the clerk's office to look up any court files for any other stories that I might have to cover that day. I visited the County Clerk's office every day.

Q. And did you later go to the District Courtroom? A. Yes, sir; I did.

Q. Will you tell us what time you arrived there?

(Testimony of Fred Cassin.)

A. It would be not more than five or 10 minutes to nine, something like that.

Q. Was anybody in the courtroom?

A. Not when I first arrived.

Q. Did some other people arrive there [229] later?

A. About five minutes to nine, Judge Borg, Mr. Felton, Mr. Estes, and I believe Marjorie Moore, Mr. Estes' secretary, arrived through the back door. In the meantime, I had gone downstairs and was waiting near the Assessor's Office.

Q. Did any other people arrive?

A. I have no recollection of anyone else arriving, no.

Q. Were you seated in the Courtroom when Judge Borg arrived?

A. Yes, I was; I was in the first row.

Q. Will you describe the arrangement there in the courtroom so that you can get yourself located with reference to the bench where Judge Borg was?

A. Well, if we use this courtroom as a reference, I would be sitting just outside of the railing and this would be the judge here (indicating).

Q. How far from the judge's bench would you be sitting? A. I would say about 25 feet.

Q. Are there some tables in the courtroom between the seats and the bench?

A. Yes, there are two counsel tables.

Q. What happened after Judge Borg and Mr. Estes and Mr. Felton arrived?

A. Well, they all went up to the courtroom—

(Testimony of Fred Cassin.)

Judge Borg took the District Judge's seat behind the bench and I believe that Mr. Estes and Mr. Felton seated themselves at one of the counsel tables—I think that Mr. Estes did and I [230] believe that Mr. Felton walked around for a while. Mr. Felton looked at his watch and looked at the courtroom clock and I think he asked me and I believe he also asked Mr. Estes what the time was and this was, I believe, one minute to nine. I told Mr. Felton that I didn't own a watch and I didn't know the time. He seemed to be checking his watch with the clock and with other people in the room.

Q. And what kind of a watch was it, a wrist watch or a pocket watch?

A. It was a wrist watch.

Q. Go ahead.

A. And then I believe that Mr. Estes and Mr. Felton carried on a conversation for a while. I don't recall what it was, but I have an impression now that it was in subdued tones. They were perhaps discussing the case because I was just sitting there waiting for things to get started. As I recall, about seven minutes after nine, Mr. Felton, whom I believed to be representing Mr. Estes at the hearing, looked at the courtroom clock and said, "It is seven minutes past nine o'clock and the complaining witness has not appeared." He made a motion at that time, I believe, that the action be dismissed against Mr. Estes because no evidence had been brought forth with which to hold Mr. Estes to the District Court.

(Testimony of Fred Cassin.)

Q. When he was talking at this time, was he addressing Judge Borg? [231]

A. When he made the first statement about the time I think he was just talking aloud to anyone that would listen, but when he made his motion for dismissal he addressed the Court and he expressly made mention of the time, that it was seven minutes after nine.

Q. And did Judge Borg make any remarks or statement at that time?

A. As I recall, as soon as Mr. Felton had finished, Judge Borg said that he agreed with Mr. Felton that no evidence had been brought forth and that he could find no reason to bind Mr. Estes over to the District Court and that the case would be dismissed.

Q. Now, during the time that you have testified to, after the time you had arrived and after Judge Borg had arrived at the courtroom and up to the time that he made the statement that you just testified to, did he make any effort to reach any telephone? A. Not that I recall.

Q. Was there a telephone, in your knowledge, in the Probate Judge's office?

A. Yes, sir; there is.

Q. Was there at that time? A. Yes, sir.

Q. About how far from where Judge Borg was sitting was it to the telephone in the Probate Judge's office? [232]

A. From where Judge Borg was sitting, I would say it would be about 10 paces.

(Testimony of Fred Cassin.)

Q. And is there a telephone also in the law library or in the reporter's office?

A. Yes, there is.

Q. About how far was it from where Judge Borg was sitting to the telephone in the court reporter's office?

A. Well, probably not more than 20 or 25 feet, I would say.

Q. Was there a telephone at that time in the County Superintendent's office?

A. Yes, I am sure there was.

Q. How far was it to that telephone?

A. Perhaps 35 feet or so.

Q. Do you recall anybody leaving the courtroom at any time after Judge Borg arrived until the case was dismissed?

A. No, I don't recall anybody leaving the courtroom.

Q. Now, after the motion for dismissal was made and granted, what happened?

A. After the case was dismissed everybody left the courtroom. I believe that we all left the same time, that is my recollection that we were all going down the stairs about the same time.

Q. Where did you go after you left the courtroom?

A. I went immediately back to the newspaper office. [233]

Q. Did you drive? A. No, I walked.

Q. By what exit of the Courthouse did you leave?

(Testimony of Fred Cassin.)

A. By the front entrance, I would say.

Q. And do you know by what method Mr. Estes, Judge Borg and Mr. Felton left?

A. No, I don't.

Q. Did they leave with you?

A. No, they did not.

Q. From the Courthouse where did you say that you went?

A. Immediately back to the newspaper office.

Q. And what did you do after you arrived at the newspaper office?

A. I started to write my story on the incidents at the Courthouse, I mean the dismissal of the action.

Q. Did you later go to the Police Station, the Moscow Police Station? A. Yes, I did.

Q. And about how long after you arrived at the newspaper office did you go to the Police Station?

A. I should say about half an hour, perhaps a little more; it could be 35 minutes.

Q. How did you happen to go to the Police Station? A. Mr. Boas sent me there.

Q. Did he give you any instructions as to what you were to do?

A. Well, as I recall, we had gotten wind of the fact that Mr. [234] Alsager and his witnesses were at the Police Station and that there had been some mixup in regard to the preliminary hearing and, as I recall, Mr. Boas sent me over to investigate.

Q. Did you go to the Police Station?

A. Yes, sir; I did.

(Testimony of Fred Cassin.)

Q. And who did you see there?

A. Mr. Alsager and a number of people that I didn't know but who I believe were witnesses to the alleged incident.

Q. Was Peggy David there?

A. Yes, she was.

Q. Was Judge Borg there?

A. No, he wasn't.

Q. Could you tell me about what time it was that you went to the Police Station?

A. It was about a quarter to ten or ten minutes to ten, it was something like that.

Q. Could you tell me about what time it was that you got back to the newspaper office?

A. You mean from the Courthouse?

Q. Yes, from the Courthouse?

A. I would say it was about 9:15.

Q. And how far is the newspaper office from the Police Station, or how far was it at that time?

A. I think it is just about a block and a half to the Police [235] Station.

Q. And that would be a block and a half farther than the Police Station is from the Courthouse?

A. Yes, I think so.

Q. It is between the Courthouse and the newspaper? A. Yes.

Q. Have you timed yourself as to how long it takes you to walk from the Courthouse to the newspaper office?

A. I would say about five minutes.

Mr. Greene: That is all.

(Testimony of Fred Cassin.)

Cross-Examination

By Mr. Tonkoff:

Q. Mr. Cassin, how long had you been reporting for the Daily Idahonian?

A. It was about 22 months prior to this.

Q. Prior to January, 1953?

A. That is right.

Q. I assume that you had attended those preliminary hearings in the past?

A. I had attended one or two in the past, yes.

Q. And, of course, they were held in the courtroom, the District Court?

A. I never attended one in the courtroom.

Q. Where did you attend them? [236]

A. The only one that I can specifically recall now was held at the Police Station, but it was held by a police judge and Justice of the Peace Kent Power.

Q. And that is the only one that you had attended?

A. That is the only one that I can recall attending, yes.

Q. You had not attended any other?

A. No; it is my recollection, but I may be wrong on this, but, as I say, it is my recollection that many of the preliminary hearings were held at odd hours, immediately upon the arrest of the parties and we would not find out about them until the next morning.

(Testimony of Fred Cassin.)

Q. When did you move to Niagara Falls, New York?

A. Well, I moved to Lockport, New York, in April of 1953, April the 25th.

Q. Are you still following your profession there?

A. I am still in the publishing business, yes; I am not a newspaper reporter.

Q. Where are you employed?

A. I am employed by myself.

Q. When were you called and notified to come back here?

A. I was called by Mr. Boas a week ago today.

Q. You say that at the time of this hearing, rather on the 15th of January, prior to this hearing, you called Judge Borg at his office? [237]

A. I believe I called at his home.

Q. At his home, pardon me. A. Yes.

Q. And for the sole purpose of finding out where this hearing was going to be?

A. Well, it wasn't only that. There had been some doubt about the hearing all along because Judge Martinson had disqualified himself. We were under the impression that the case had been transferred to Judge Borg but I believe at that time, I am not certain, but I believe at the time that there was still some doubt in my mind that Judge Borg would handle the case.

Q. There was some doubt in your mind as to whether there was going to be a hearing at all, honestly in your mind, wasn't that right?

A. Well, I don't recall any doubt of that sort. I

(Testimony of Fred Cassin.)

had no reason to believe that there would not be a hearing.

Q. Hadn't you heard that a dismissal was filed with Judge Martinson? A. No, I hadn't.

Q. You hadn't found that out?

A. No; today was the first time that I heard about that.

Q. You said that you went up every day and looked at the judge's records, didn't you?

A. Well, I believe that it wasn't on the record, at least, I didn't see it on the record of the case against Mr. Estes. [238]

Q. You didn't see it there on the 13th or the 14th of January, the dismissal, which is Exhibit No. 11? A. No, I didn't.

Q. But there was some doubt in regard to where the hearing was to be held?

A. Yes; I remember that there was some doubt that the hearing would be held at this time, for this reason: Judge Martinson, the Probate Judge, had originally set this time for the preliminary hearing and I thought when the case went to Judge Borg that Judge Borg might set another time at his convenience for the hearing.

Q. You knew that the case was set for 9:00 o'clock in the morning on the 15th because your paper had published that?

A. Yes, I knew that.

Q. You hadn't seen any continuance or any order changing the setting, had you?

A. No, I hadn't.

(Testimony of Fred Cassin.)

Q. Any change differing from Judge Martinson's record? A. No, I didn't.

Q. You knew, as a newspaper reporter, that Judge Borg had not been active as police judge for several months prior to January 15, isn't that right?

A. Yes, I knew that.

Q. And you knew that he had no office down at the Police Station, didn't you, Mr. Cassin? [239]

A. Yes.

Q. And that is the reason that you took the trouble to call him at home to find out where this hearing would be, wasn't it?

A. Not especially. I took the trouble to call him because Mr. Boas told me.

Q. On an order from Mr. Boas—Mr. Boas had some doubt in his mind because he told you to call him as to where this hearing was to be?

A. I don't know, I couldn't say as to that because I don't know what Mr. Boas had in his mind.

Q. You did advise Mr. Boas after you made the phone call that the hearing would be up there, didn't you?

A. Yes, I told him it would be at the Courthouse.

Q. And that was prior to the time that the hearing was held that you advised Mr. Boas it would be at the Courthouse?

A. Yes, I think it couldn't have been much later than a quarter past eight.

Q. Did you speak to Mr. Estes on that date, Mr. Cassin? A. Yes, I believe I did.

(Testimony of Fred Cassin.)

Q. Concerning the filing of this complaint?

A. Yes.

Q. You told him that it appeared that Felton had filed the complaint to annoy him only, didn't you?

A. Where was this supposed to have occurred?

Q. Well, in a conversation coming down the stairs at the Courthouse? [240]

A. I had a conversation coming down the stairs at the Courthouse with Mr. Estes and I asked Mr. Estes if he would care to make——

Q. I asked you, did you make that statement?

The Court: Just let him answer the question you asked.

A. I did not make that statement.

Q. What was that?

A. I did not make that statement.

Mr. Tonkoff: That's all.

Redirect Examination

By Mr. Clements:

Q. Do you wish to explain your answer?

A. I asked Mr. Estes at that time if he would care to make a statement to the *Idahonian* regarding the case. I thought it was only fair to him to let him have his say in the matter because he had been put to a great deal of embarrassment by the charge. I assumed at that time, since I knew nothing about the Police Station incident, I assumed at that time Mr. Alsager had failed to appear and

(Testimony of Fred Cassin.)

wasn't going to prosecute any charges and that Mr. Estes would be completely cleared of any further prosecution, and so I asked him to make a statement for this reason. He said [241] that he would see me later. As he was going down the stairs, he swore and said these people never intended to go through with it, they were just doing this to annoy me and cause me trouble.

Mr. Clements: That is all.

Mr. Greene: I have one further question, your Honor.

The Court: Very well.

Redirect Examination

By Mr. Greene:

Q. You made mention of Mr. Felton's being present. Will you give his name?

A. That was Mr. Tom Felton, Mr. Estes' partner.

Q. That was not Mr. Henry Felton?

A. No, sir.

Mr. Greene: That is all.

Recross-Examination

By Mr. Tonkoff:

Q. Mr. Cassin, you say that you assumed that Mr. Alsager wasn't going to prosecute. You had that from something that you had heard, I assume?

A. I assumed that Mr. Alsager was not going to prosecute because of the fact that he did not appear at the Courthouse. Of [242] course, I had no idea

(Testimony of Fred Cassin.)

that there would be any dispute over this incident. I thought that Mr. Alsager hadn't appeared because he was going to drop the case.

Q. At other times when the prosecutor and the prosecuting witness didn't appear that was the regular course to follow, to order a dismissal——

The Court: That is a question of law and this witness can't answer that.

Mr. Tonkoff: That's all.

Mr. Greene: Your Honor, we have a series of exhibits here and if your Honor was going to take a recess we might have them marked during the recess and then offer them at the time Court convenes after the recess.

The Court: You might have them marked and show them to counsel and that will save some time. We will take a recess for 15 minutes.

April 7, 1954, 3:05 P.M.

Mr. Greene: I would offer in evidence at this time the Probate Court records of Latah County, being a criminal complaint in the case of the State of Idaho vs. Murray Estes charging assault with a deadly weapon against one Richard Shoup.

The Court: Is there any objection? [243]

Mr. Tonkoff: We have agreed, your Honor, that identification be waived but as to the competency, we object to that, we object as to competency only.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 14 I

will offer the original docket of Judge John K. Borg in the case of the State of Idaho vs. Murray Estes.

Mr. Tonkoff: The same objection.

The Court: It may be admitted.

Mr. Greene: As Exhibit No. 15 I will offer the original court file in the justice precinct before Justice Kent Power in the case of the State of Idaho vs. Murray Estes.

Mr. Tonkoff: Of course, your Honor, that has nothing to do with this matter nor is it commented on in the article and we object to it on that basis.

Mr. Greene: All of these incidents were commented upon in the article.

The Court: I certainly hate to read this article through again.

Mr. Greene: I might say, your Honor, this court file is the file of the case where Murray Estes is charged with assault upon one E. G. Greene and it is referred to in the article.

The Court: It may be admitted. [244]

Mr. Greene: As Defendant's Exhibit No. 16 I offer the original court docket of Judge Kent Power in the same case.

The Court: It may be admitted.

Mr. Greene: As Exhibit No. 17, Defendant's Exhibit No. 17, I offer the original docket of Judge John K. Borg's court, in the same case.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 18 I offer the original docket of Judge Kent Power,

Justice of the Peace, in the case of the State of Idaho vs. Murray Estes, charging a battery.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 19 I offer the original court file in the justice court before Kent Power and the Probate Court of Latah County on the charge of battery, against Murray Estes.

Mr. Tonkoff: I did not object to the others, but I must object to this as entirely incompetent.

The Court: Is that in the article?

Mr. Greene: Yes, your Honor.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 20, I offer the original docket of the Probate Court of Latah County in the case of the State of Idaho vs. Murray Estes, [245] this being the battery charge.

Mr. Tonkoff: And that is objected to, your Honor.

The Court: Is that referred to in this article?

Mr. Greene: That is the battery charge, yes, your Honor.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 21, I offer the original court docket of Justice Kent Power in the case of Idaho vs. Richard Shoup, charged with attempt to compound a crime, a felony.

Mr. Tonkoff: We make the same objection.

The Court: It may be admitted.

Mr. Greene: As Defendant's Exhibit No. 22, I offer the original docket of the Probate Court in the case of the State of Idaho vs. Murray Estes,

assault with a deadly weapon upon Richard Shoup.

The Court: It may be admitted.

Mr. Greene: If the Court please, these exhibits are lengthy and I would waive the reading of them to the jury.

The Court: Yes, either side may refer to them in their argument or at any time during the [246] trial, and I will send them in the jury room when the jury retires.

Mr. Clements: May we stipulate for the record that they may be considered as having been read at this time?

Mr. Tonkoff: Yes, we will stipulate to that.

The Court: It may be so understood.

Mr. Greene: We will call Mr. Tunnicliff.

R. J. TUNNICLIFF

called as a witness by the defendant, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Greene:

Q. Mr. Tunnicliff, you have been heretofore sworn in this matter? A. Yes, sir.

Q. Now, on January 21, 1953, did you attend a preliminary hearing at which Murray Estes was the defendant and charged with the crime of assault with a deadly weapon upon one E. G. Greene?

A. I did.

Q. You are the official court reporter for Latah County, I take it?

A. For the second judicial district, yes. [247]

(Testimony of R. J. Tunnicliff.)

Q. How long have you been engaged in reporting?
A. Off and on since 1920.

Q. And I take it you have taken in shorthand a good many judicial proceedings?

A. I have, yes.

Q. Did you, pursuant to a subpoena, bring your original notes of the proceedings had at the preliminary hearing referred to?
A. I did.

Q. And did you make a transcription of those notes, Mr. Tunnicliff?
A. Yes.

Q. Will you refer to what has been marked as Defendant's Exhibit No. 23 and state what that is?

A. That is the transcript of the proceedings on the preliminary examination January 21, 1953, in the case of the State of Idaho vs. Murray Estes.

Q. And is that a true and correct transcript of the testimony taken and the proceedings had at the preliminary hearing in question?
A. It is.

Mr. Greene: I now offer in evidence Exhibit No. 23, marked for identification.

Mr. Tonkoff: I object to it, and, your Honor, I would like to be heard.

The Court: Yes, I will hear you on it. [248] I have one question to ask this witness: Was this preliminary before the plaintiff in this case?

A. Yes.

Mr. Greene: Yes, your Honor, that is the second charge against Mr. Estes.

The Court: Is there anything further you want from this witness, Mr. Greene?

Mr. Greene: No, that is all.

(Testimony of R. J. Tunnicliff.)

The Court: Do you want to cross-examine him, Mr. Tonkoff?

Mr. Tonkoff: Yes, your Honor.

Cross-Examination

By Mr. Tonkoff:

Q. Mr. Tunnicliff, who employed you to take the notes at that hearing? A. Murray Estes.

Q. Did you have any conversation with Mr. Alsager concerning the case being reported?

A. Not prior to the hearing. I did about a week or ten days afterward.

Q. What did he tell you as to whether or not it was necessary or whether he believed it was necessary to have a reporter there?

A. You mean at that later conversation? [249]

Q. Yes.

A. He came to me and said that he wished he had known that a reporter was required.

Q. Was required? A. Yes.

Q. Did he make any other statement to you concerning that?

A. I believe either at that time or later that he intimated that he would like to have a copy of it.

Q. Did you have any conversation with Mr. Alsager prior to the hearing at which conversation he asked you to come in and report?

A. I did not.

Q. You had no conversation with him concerning your being present at this hearing?

(Testimony of R. J. Tunnickliff.)

A. No, I did not, at any time.

Mr. Tonkoff: Thank you; that is all.

Mr. Greene: That is all.

The Court: Now, I will hear you before I admit this exhibit.

Mr. Tonkoff: Very well, our position——

The Court: No, I will hear you later, before I admit the exhibit, however. We will go on with the testimony at this time.

Mr. Tonkoff: Your Honor, Mr. Tunnickliff has stated he would like to be excused and we have no further [250] questions to ask.

Mr. Greene: That is perfectly agreeable with us.

AL BARRACKMAN

called as a witness by the defendant, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Greene:

Q. Will you state your name and place of residence? A. Al Barrackman, Moscow, Idaho.

Q. And what is your occupation?

A. I am sports editor and general reporter for the Daily Idahonian.

Q. What were you doing on May 12, 1953?

A. Well, after pursuing my normal duties, I covered a meeting at the high school cafeteria.

Q. And what were you employed as at that time?

A. General reporter and sports editor.

(Testimony of Al Barrackman.)

Q. And what were your regular hours of employment? A. From 7:30 until 4:00.

Q. Did you attend special events for special stories from time to time? A. Yes.

Q. On the evening of May 12th, did you say that you attended [251] a meeting at the high school?

A. Yes, that is right.

Q. Who instructed you to attend that meeting?

A. The editor, Mr. Boas.

Q. Do you recall what time he instructed you to go to that meeting?

A. I don't recall, but I presume it was in the morning.

Q. And was attending meetings of this kind a part of your regular duties as reporter?

A. Yes.

Q. And will you tell us what you did that evening in attending that meeting?

A. As I recall it, I arrived at the high school possibly five minutes after the meeting began and I found myself a chair in the crowded confines of the cafeteria in the rear, and I immediately began taking notes of the proceedings.

Q. Who presided at that meeting, if you recall?

A. I believe it was Dean Jeffers of the University of Idaho.

Q. And who is he?

A. I don't know his exact capacity, but, as I recall it, he is a professor at the University.

Q. Could you tell us approximately how many people were there?

(Testimony of Al Barrackman.)

A. I would say there were upward of 150.

Q. Could you tell me whether they were University students or otherwise? [252]

A. I would say they were a mixture of townspeople. I don't believe there were any University students, but there might have been.

Q. Do you recall the people that talked at the meeting? A. Vaguely, yes.

Q. Could you name some of them for us?

A. There were a number of townspeople; one that I can recall distinctly was the Reverend Mr. Prawl; that, offhand, is the only name I can recall right now.

Q. Do you recall Captain Thomas making a talk there that evening? A. Oh, yes.

Q. And did you hear his talk?

A. Yes, I did.

Q. Did you take any notes of the statement that he made? A. Yes, sir.

Q. About how long did the meeting last?

A. I believe it was over at about 11:00 o'clock or shortly thereafter.

Q. Could you tell me about when the meeting started?

A. It was either 7:30 or 8:00, I am not sure on that.

Q. And about when did Captain Thomas start talking?

A. It was midway through the meeting, I would say. It was after the preliminaries had been dispensed with; it was an organizational meeting. [253]

(Testimony of Al Barrackman.)

Q. What do you mean by an organizational meeting?

A. Well, it was a group of citizens that apparently had been called together to form an organization and they dispensed with the business of naming officers and picking a temporary chairman, as I recall it, and other business of that type.

Q. And then the Captain spoke next?

A. I don't recall the order in which he did speak.

Q. Do you recall how long he talked?

A. Possibly a half an hour; I am not aware of just the time.

Q. Will you refer to Exhibit No. 1, which is a copy of the Daily Idahonian of May 13th, and referring to the article with the heading, "Good Government Association Formed at Public Meeting Called at School," who wrote that story?

A. I did, sir.

Q. And from what source did you get the information that is contained in it?

A. From my own information that I had gathered the previous evening.

Q. Was there anything furnished to you in the way of a written instrument of what went on at the meeting that you prepared the story from?

A. No, sir.

Q. I want to call your attention to a part of the article that reads as follows: "This was a ridiculous situation, said Captain Thomas. A motion for dismissal was made and it was [254] dismissed. If this

(Testimony of Al Barrackman.)

had been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witnesses and come on over." Did you hear Captain Thomas state those words that night? A. Yes, I did.

Q. And are they a correct copy of this statement as he made it? A. As I remember it, yes.

Q. Referring again to the article: "But these things, Thomas said, continued to disturb me. The extraordinary circumstances in which the first felony was dismissed. Circumstances of the dismissal of the second charge against Estes. There is no way to get justice or to correct the faults in the administration of justice without a grand jury." Did you hear Captain Thomas state those words at that meeting? A. Yes, I did.

Q. And did you make the excerpts in the story from your notes as you took them at the meeting?

A. Yes.

Q. In the newspaper article, Exhibit No. 1, what did you attempt to show by it?

Mr. Tonkoff: That is calling for a conclusion and, your Honor, the authorities are that they cannot say one thing and later say I mean something else.

Mr. Greene: I didn't mean it in that way and I will withdraw the question. [255]

Q. Is there anything in the article, Mr. Barrackman, Exhibit No. 1, other than the proceedings that went on at the meeting at the high school that evening?

(Testimony of Al Barrackman.)

Mr. Tonkoff: That is calling for a conclusion, your Honor, and we object to it.

The Court: No; he was at the meeting and he has the article.

Mr. Tonkoff: That is my objection anyway.

The Court: The objection will be overruled, and I don't believe there is, no.

Q. When did you write the story?

A. In midmorning the following day.

Q. When is the Daily Idahonian published?
What time of the day?

A. In the afternoon.

Q. In the afternoon? A. Yes, sir.

Q. Do you know whether there was a reporter at the meeting that night from the Lewiston Tribune?
A. Yes, sir.

Q. Did you know him at that time?

A. Yes, sir.

Q. If you refer to Exhibit No. 6, being the article in the Lewiston Tribune on the morning of May 13, 1953, I will ask you to state if you had read the article in Exhibit No. 6, the Tribune, before you wrote your own story appearing in [256] Exhibit No. 1?
A. I had.

Q. About when did you read the article in the Tribune?

A. It was some time soon after 7:30 o'clock the following morning.

Q. And how soon did you start to write your story?

(Testimony of Al Barrackman.)

A. I would say I started writing mine approximately at 9:30.

Q. Did anyone write anything in Exhibit No. 1 other than yourself? A. No.

Q. What did you do with the story after you finished?

A. I presented it to Mr. Boas, the editor.

Q. Do you know whether he made any changes in it, of any kind?

A. Well, it is very possible that as an editor he did, yes.

Q. At the time of the meeting were you acquainted with Captain Thomas?

A. No, I wasn't.

Q. Were you acquainted with Judge Borg?

A. Yes, sir.

Q. How long had you known him?

A. I believe that I had known Mr. Borg ever since he came to Moscow.

Q. What was the nature of your acquaintance with him? A. Just a passing acquaintance.

Q. Did you ever transact any business in his court? [257] A. None whatever.

Q. Did you see Judge Borg at the meeting that night?

A. No; I don't believe that he was there.

Mr. Greene: That is all.

(Testimony of Al Barrackman.)

Cross-Examination

By Mr. Tonkoff:

Q. You are still employed with the Idahonian, I presume? A. I am.

Q. For how long did Captain Thomas talk at the meeting?

A. Well, I find that it is hard to remember, but I believe that it was less than a half hour.

Q. He was standing up on a table or a pedestal?

A. No; he was just standing on the floor with a rostrum of sorts in front of him while he was talking.

Q. And as he talked, he turned over pages of a manuscript?

A. No; I don't believe that he had a manuscript.

Q. Well, a paper of some kind?

A. He used notes, as I recall.

Q. Did he ever furnish you with those notes?

A. No, sir.

Q. Did you ever ask him for them?

A. No, I did not.

Q. Did you talk with him that night?

A. No, I don't believe I did. [258]

Q. Did you talk with him afterward?

A. I don't believe that I ever talked to Captain Thomas.

Q. Did you send any information to the Tribune? A. I beg your pardon.

Q. Did you ever send any information about this to the Tribune? A. No.

(Testimony of Al Barrackman.)

Q. Did you notice the Tribune reporter there?

A. Yes, sir.

Mr. Tonkoff: That is all.

LADD HAMILTON

called as a witness by the defendants, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Clements:

Q. Mr. Ladd? A. Hamilton.

Q. I beg your pardon; Ladd Hamilton, that is correct? A. That is correct.

Q. And where do you live, sir?

A. Clarkston, Washington.

Q. By whom are you employed at this time?

A. The Tribune Publishing Company.

Q. And what is your profession?

A. A newspaper reporter. [259]

Q. How long have you been engaged in newspaper work or in that business?

A. All together approximately eight years.

Q. And what was your academic training?

A. I attended the University of Idaho; however, I did not graduate from the University.

Q. What experience have you had as a newspaper reporter, an editorial writer or a feature writer?

A. My experience has been mostly as a newspaper writer, also I have had some experience as a

(Testimony of Ladd Hamilton.)

feature writer and an editorial writer, did some editing.

Q. Have you ever been employed by either of the wire services, the AP or the UP?

A. No, I have not.

Q. What other newspapers have you worked on beside the Lewiston Tribune?

A. I have worked for the LaGrande Evening Observer, an afternoon daily, and I have done part-time work for the Coeur d'Alene Press, an afternoon daily, and I worked one summer for the Spokesman Review, a morning daily at Spokane, Washington.

Q. During your newspaper employment and experience, have you had occasion, or had you before May 12, to report public meetings?

A. Yes, sir.

Q. On May 12, 1953, what was your particular position with the [260] Lewiston Morning Tribune?

A. Reporter.

Q. Who was the managing editor on that date?

A. William F. Johnston.

Q. Did you have occasion to be in Moscow, Idaho, on May 12, 1953?

A. Yes, sir.

Q. For what purpose?

A. Covering a public meeting.

Q. Why were you there? Who sent you on that mission?

A. I received the assignment some time during the day of the 12th.

(Testimony of Ladd Hamilton.)

Q. Was that a routine assignment, or were there any special instructions connected with it?

A. There were no special instructions; it was a routine assignment.

Q. And did you attend that meeting?

A. I did.

Q. And where was it held?

A. It was held in the high school building.

Q. In what part of the building?

A. I didn't know what the room would have been used for at other times; it was either in the basement or on the ground floor.

Q. Was it a large room? [261]

A. A fairly large room, yes.

Q. How was the meeting conducted? Were you there when the meeting opened?

A. I might have gotten there a moment after the meeting officially opened. I know that I had trouble in finding a seat.

Q. To your best recollection, how many people attended that meeting?

A. To the best of my recollection there were probably between 150 and 200 people.

Q. Were you acquainted with any of the people in the audience or on the platform?

A. I was acquainted with a few of them.

Q. Could you give us generally a description of the people, the class or type of people, would you say that it was a citizenry appearing type of people or was it a student group?

A. Would you repeat the question, please?

(Testimony of Ladd Hamilton.)

Q. It was quite awkward and I don't know whether I can or not. Were those people a mature group in appearance? Did they have the appearance of citizens of the town or would you say it represented a University group?

A. By appearance they were citizens of Moscow and the immediate area.

Q. Was there a chairman conducting the meeting? A. Yes, there was.

Q. Do you know who it was?

A. Yes; it was Dean Jeffers of the [262] University.

Q. Were you personally acquainted with him?

A. Yes, I knew him.

Q. Did you speak to him that evening at all?

A. I can't remember particularly, but it is likely that I may have.

Q. Was he the chairman of this meeting?

A. Yes.

Q. And what did you understand, after you got in there, what the purpose of the meeting was?

A. Yes, I did.

Q. And what did you understand the purpose to be?

A. I understood the purpose was to form what they called a good government league.

Q. Did they name committees for that purpose that night?

A. I remember that there were some people named to some offices; whether they were committee offices or otherwise, I don't remember.

(Testimony of Ladd Hamilton.)

Q. Were there people other than Dean Jeffers addressed that meeting that night?

A. Yes, a number of people.

Q. Who were some of them that you can remember?

A. As I recall, there was Dr. Hossak, the University of Political Science Department; Captain Thomas, of course, and, as I recall, District Judge McQuade was a speaker, and there was another man who was a member of the faculty of the [263] University. To the best of recollection, and this is somewhat hazy, there were some women who spoke who were townspeople.

Q. To refresh your memory, do you recall whether Mr. Alsager addressed the meeting that night?

A. I don't remember.

Q. What did you do, as a newspaper reporter, from the time you went in there until you left?

A. I took notes.

Q. Handing you Defendants' Exhibit No. 6, which is a copy of the Lewiston Morning Tribune of May 13, 1953, to an article in connection with grand jury, do you have it there with you?

A. Yes.

Q. Who wrote that article?

A. I did.

Q. From what did you write it?

A. From notes which I wrote at the meeting.

Q. You heard Captain Thomas speak that night?

A. Yes.

Q. Now, refer to the article and find the language of this quotation that I give you: "The

(Testimony of Ladd Hamilton.)

meeting opened with a long and detailed review of the Estes-Shoup case by Captain Thomas C. Thomas, Commander of the University Naval ROTC unit, of which Shoup was a member.” Do you find that language? [264]

A. I have it, yes.

Q. Do you find that part?

A. The meeting opened with a long and detailed review and so on.

Q. Yes. A. Yes, I have it.

Q. You wrote that language, did you?

A. Yes, I did.

Q. Calling your attention to this excerpt: “Captain Thomas declared that, I don’t like the smell of it. I don’t think that we have here in this county now the proper administration of justice.” Did you hear Captain Thomas make that remark at that meeting? A. I did.

Q. And he made that remark at that meeting?

A. He did.

Q. I call your attention to another quotation supposed to be words of his: “Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol.” Did you hear Captain Thomas say those words?

A. I don’t see that paragraph just now.

Q. Two paragraphs below the one you read from before? A. Yes, I see it, and it was.

Q. Calling your attention to a further quote in that article: “Legal maneuvers had made it impos-

(Testimony of Ladd Hamilton.)

sible for the Prosecuting [265] Attorney to get a trial on that charge."

A. I don't see that, but, as I recollect, it was.

The Court: I am glad somebody else has trouble finding that besides myself, especially the man that wrote it.

A. I see it, yes.

Q. Did you hear Captain Thomas speak those words? A. Yes.

Q. Calling your attention now to another quotation from the exhibit: "At 9:00 a.m., he added, the Prosecuting Attorney and witnesses and the court reporter appeared at the Police Court, normally the place where the hearing would be held, but the judge and Estes had gone, in the meantime, to the District Courtroom to hear the case." Do you find that?

A. Yes.

Q. And did you hear Captain Thomas speak those words? A. Yes, I did.

Q. Now, referring to the quotation: "This was a ridiculous situation, Thomas said." Do you find that? A. Yes.

Q. Did you hear Captain Thomas utter those words? A. I did.

Q. Referring to another quotation: "Counsel for Estes moved that the case be dismissed and it was. If this had been an honest mistake, it could have been easily rectified simply [266] by lifting a telephone and telling the Prosecuting Attorney to bring his witnesses and come on over." Do you find that? A. Yes.

(Testimony of Ladd Hamilton.)

Q. And did you hear Captain Thomas utter those words? A. Yes, sir; I did.

Q. Those words were his language and not your words? A. That is his language, yes, sir.

Q. Referring to another quotation from the article: "These things disturb him"—let me read that again—"but Thomas said these things disturbed him." A. I see that, yes.

Q. Did you hear Captain Thomas make that statement?

A. Do you mean, did I hear him make the phrase that follows that?

Q. That quotation that Thomas said these things disturbed him, is that your phrase, or did you hear Thomas make that statement?

A. That is not quoted, that is not a direct quote, you see, that is followed by a colon.

Q. Yes, that is true. Now, referring to this quotation: "The extraordinary circumstances of dismissing the first battery charge while the prosecutor was in the regular courtroom and the judge and defendant were in another." Do you find that?

A. Yes, sir. [267]

Q. Is that a quotation of Captain Thomas?

A. Yes, it is.

Q. And did you hear him utter those words?

A. Yes, sir, I did.

Q. "Circumstances of the dismissal of the second charge against Estes." What is that? Whose words are those?

A. Those are Captain Thomas' words.

(Testimony of Ladd Hamilton.)

Q. And you heard him utter those words?

A. I did.

Q. Now, referring to the excerpt, what to do about it—I am reading from the article: “What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we’d go through this same rigamarole. There is no way to get justice or to correct the fault in this administration of justice in Latah County without a grand jury.” Is that a quotation of the language of Captain Thomas? A. It is.

Q. Did you hear Captain Thomas utter those words? A. Yes, I did.

Q. At that meeting? A. I did.

Q. On May 12, 1953? A. Yes.

Q. Were you acquainted with Captain Thomas that evening? [268] A. No.

Q. Did you have any conversation with Captain Thomas that evening?

A. Not to my recollection.

Q. You were in there all of the time while Captain Thomas was addressing this audience?

A. Yes, sir; I was.

Q. Did he read his speech from a written manuscript? A. No; not to my recollection.

Q. How did he speak?

A. As I recall, he spoke from notes.

Q. Did you ever see those notes?

A. No; I never did.

(Testimony of Ladd Hamilton.)

Q. Did you ever request him for a copy of the notes? A. No.

Q. You had no conversation with him in reference to how he prepared his address, or what he was speaking from? A. No.

Mr. Clements: That is all; you may examine.

Cross-Examination

By Mr. Tonkoff:

Q. Had you been up here in Moscow previously to report any incidents? [269]

A. I believe probably that I had but at this time I don't remember what they were.

Q. Did you cover this area normally or did someone else along with you?

A. It was our usual custom to have this area covered by someone from the plant or by a correspondent here.

Q. And this meeting was of sufficient importance so that your paper would send you up here to make a report on it? A. Yes.

Q. And undoubtedly you had heard about the dispute or confusion or whatever you want to call it concerning this Estes case, had you not?

A. I had heard what I had seen in the newspapers, of course.

Q. That is in the Tribune, I assume?

A. Well, I read more than one newspaper.

Q. Do you? A. Yes.

Q. The boss allowed you to do that?

(Testimony of Ladd Hamilton.)

A. Yes.

Q. Now, referring to the Tribune, you have read some articles in there so that this matter was of sufficient importance that it demanded attention?

A. Yes.

Q. On how many occasions would you say that the Tribune had been publishing articles concerning this situation prior to May 13? [270]

Mr. Clements: We object to that as immaterial and not proper cross-examination.

The Court: If they were articles that were shown to the Court, they were only news articles. However, he may answer if he can.

A. Will you state the question, please?

Q. On how many occasions would you say that the Tribune had published articles as to this incident concerning Mr. Estes or the controversy or whatever you call it?

A. Are you referring to the incident of the dismissal of that case on January the 15th or the altercation on December 14?

Q. Let's take the one of the dismissal of the 15th.

A. We did have an article or story regarding that on the following day?

Q. Did you have one on the previous day, Mr. Hamilton?

A. I don't recall any.

Q. Now, Mr. Hamilton, when you take notes at a meeting such as that, do you take them in long-hand or do you take them in shorthand?

A. I don't use Gregg or Pitman. I use a kind of

(Testimony of Ladd Hamilton.)

system of my own, which is a mixture of longhand and abbreviations and what not.

Q. Can you almost take a normal conversation down? A. Yes. [271]

Q. Of one speaking? A. Yes.

Q. How long a time did Captain Thomas talk that night? It has been testified here for about a half hour, is that right?

A. I would not be able to answer that because I simply don't remember.

Q. But you distinctly remember that you heard him say, "I don't like the smell of it," is that right?

A. Yes.

Q. And then in the next sentence, he said, "I don't think we have here now in this country the proper administration of justice"?

A. In this county.

Q. You are right. "Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol." You distinctly heard him make that statement?

A. I am not referring to the article now but that sounds like the statement that he made.

Q. If I am incorrect, I am sure counsel will let us know. I am reading it here: "Legal maneuvers had made it impossible for the Prosecuting Attorney to get a trial on that charge." I assume that you knew Mr. Alsager was Prosecuting Attorney since January 12?

A. I don't know now whether I knew that then or not.

(Testimony of Ladd Hamilton.)

Q. He said, "At 9:00 a.m. he added the Prosecuting Attorney [272] and witnesses and the court reporter appeared at the Police Court, normally the place where the hearing would be held." Did you hear him make that statement?

A. You say, where did Captain Thomas make that statement?

Q. I am reading from the article: "At 9:00 a.m., he added, the Prosecuting Attorney and witnesses and the court reporter appeared at the Police Court, normally the place where the hearing would be held." Did you hear him make that statement?

A. A statement similar to that. I am not reading as you go along. I believe it is where the hearing would be held rather than could be held, isn't that it?

Q. That is right. Did I misread that again?

A. Yes.

The Court: That is all right; catch him if you can.

Mr. Tonkoff: You are right. I assure you that I did not misquote it intentionally.

Q. I assume you are familiar and had reported preliminary hearings, had you not?

A. I haven't often had occasion to report preliminary hearings.

Q. I wonder if you have ever reported any up here, Mr. Hamilton?

A. I have never reported any in Moscow that I recall.

Q. I suppose that you have reported some in Lewiston?

(Testimony of Ladd Hamilton.)

A. I have reported the results of some. [273]

Q. You never attended any?

A. I believe possibly that I have, but I could not tell when or which ones.

Q. It says: "But the Judge and Estes had gone in the meantime to the District Courtroom to hear the case." Did you know that Mr. Estes had an attorney at the time that he appeared?

A. I don't remember now whether I knew that at that time or not.

Q. You learned it subsequent, is that right?

A. Well, yes.

Q. It says: "That Thomas said these things disturbed him. The extraordinary circumstances of dismissing the first battery charge while the prosecutor was in the regular courtroom and the judge and defendants were in another." He said that, did he not? No doubt about it?

A. That is my recollection.

Q. Now, did you leave out anything that he said at that meeting, do you know? A. Yes, I did.

Q. Did he say something else in connection with this situation that you didn't report, or did report, and it wasn't printed?

A. Yes; he said some things that I didn't report. Some things that I did not report.

Q. Do you remember what they were?

A. No. They were minor things that I didn't consider had any particular bearing or were not very important. You very [274] seldom report a

(Testimony of Ladd Hamilton.)

public meeting or speeches that are made at a public meeting completely in toto.

Q. Generally you, in reporting a public meeting, if there is any doubt about the contents of anything said whether it might be maligning someone, you generally leave that out, don't you? In other words, Mr. Hamilton, if you think that the words are severely criticizing someone, you put it in your own language rather than to quote somebody, don't you?

A. You never consciously commit a libel.

Q. Sometimes you make that mistake though?

A. Papers have made that mistake.

Q. Now, when you wrote this article, did you submit it to your superior? A. Yes, sir.

Q. Is Mr. Alford your superior? Who is your superior?

A. He was not my direct superior on that night.

Q. Who was?

A. My direct superior on that night was the city editor.

Q. And who was that?

A. I don't recall who was on the desk.

Q. At any rate, the article appeared in the paper and you read it? A. Yes.

Q. And that was in substance the way that you had turned it in? A. Yes. [275]

Q. I believe I asked about Captain Thomas, but I forgot whether I asked you whether or not you had a conversation with him on that night?

A. I don't recall that I did.

Q. Or subsequently?

(Testimony of Ladd Hamilton.)

A. I don't recall any conversation.

Mr. Tonkoff: I think that is all; thank you.

Redirect Examination

By Mr. Clements:

Q. What time did this meeting adjourn?

A. I would not be able to put a time on it, but it seems to me that it was around 11:00.

Q. Where did you write the story from your notes?

A. I left the meeting and went to a fraternity house and wrote it there.

Q. Where?

A. To a fraternity house on the campus of the University of Idaho.

Q. And how did you turn your story into your paper? A. By telephone from the University.

Q. Why did you write the story up here and then telephone it down there?

A. Because it was approaching deadline time and I did not have [276] time to drive back down from Moscow.

Q. Will you explain to the jury what you mean by deadline time?

A. That is the time when the paper must go to press and when all of the copy must be prepared.

Q. The copy must be in to the linotype room in order that it make the press publication?

A. Yes, sir.

Mr. Clements: That is all.

Mr. Tonkoff: That's all.

LOUIS A. BOAS

recalled as a witness for the defendants, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Greene:

Q. You are the Mr. Boas who previously testified in this case? A. Yes, sir.

Q. If you will refer to Exhibit No. 1 and to the article headed, "Good Government Association Formed at Public Meeting Called at School."

A. Yes, I have it.

Q. Did you see that story before it was published? A. Yes.

Q. Where did you obtain it?

A. Mr. Barrackman, the reporter, handed it to me. [277]

Q. And do you recall—when did you first see it?

A. I imagine it was around 11:00 o'clock in the morning.

Q. What time does the *Idahonian* go to press?

A. We stop setting type at 1:30 in the afternoon.

Q. After Mr. Barrackman gave you the story, what, if anything, did you do with it?

A. I scanned it.

Q. Did you make any changes in the story?

A. No material changes.

Q. What kind of changes did you make?

A. Well, say punctuation and checking for misspelling or grammatical checks of that kind which we do with all copy.

(Testimony of Louis A. Boas.)

Q. Did you make any changes in the quoted language that the story shows Captain Thomas made?

A. No; I would not do that, at least without consultation with the reporter.

Mr. Greene: I think that's all.

Cross-Examination

By Mr. Tonkoff:

Q. Mr. Boas, you knew at the time that you passed upon this article, did you not, and your paper had published that Mr. Estes had requested that the dismissal be set aside and the proceedings be continued as though no dismissal had ever taken place on January 15, 1953?

A. That was a long time before that. [278]

Q. That's right. A. Yes, sir.

Q. I refer you to Exhibit No. 24. Was that exhibit ever printed in your paper on the 17th of January, 1953? A. Yes.

Q. And you have knowledge of that, of course, Mr. Boas, of the article appearing in your paper?

A. Let me look at it a moment.

Q. Yes; pardon me. A. Yes.

Mr. Tonkoff: I offer this exhibit in evidence.

Mr. Greene: We have no objection.

The Court: It may be admitted.

Mr. Tonkoff: I would like to read it, if I may.

The Court: You may.

Mr. Tonkoff: This is Exhibit No. 24 and the article is entitled, "Estes Asks That Dismissal of

(Testimony of Louis A. Boas.)

Charges Be Set Aside. Murray Estes, Moscow attorney, who has been charged with assault with a deadly weapon last Monday afternoon, and against whom the charge was dismissed in a preliminary hearing at the Courthouse Thursday morning, said today that he would file a motion to have this dismissal set aside and a new time for [279] preliminary hearing. Estes made this known in a statement given the Daily Idahonian this morning. This dismissal was entered by Justice John Borg when the complaining witness, Richard L. Shoup, and Prosecutor Melvin Alsager failed to appear at the time fixed for the hearing.

"Later it developed Alsager, Shoup and eight other witnesses were at the Police Station in the belief the hearing would be held there. Estes, in his statement today, said: During the past week I have remained silent, despite all of the adverse publicity which I have received, believing, as I have always believed, that other people were not interested in my personal troubles. It is now apparent that I must take some action to defend myself and my family." And in capital letters, "Not Warranted," and the article goes on: "The facts do not warrant the charge which has been placed against me, nor the publicity which the case has received. After living in this community for 44 years, 20 of which have been spent in the practice of law, and having never been accused of a crime during that period, it would seem that the public would believe some logical explanation to exist for the actions on my

(Testimony of Louis A. Boas.)

part which give rise to this incident. Apparently, I have not received the benefit of that indulgence. It has been implied that the charge filed against me was dismissed as [280] the result of a trick. Such was not the case. It was announced in the Daily Idahonian on Tuesday that a preliminary hearing would be held at the County Courthouse on Thursday at 9:00 a.m. In the 20 years I have practiced law, a preliminary hearing has never been held, to my knowledge, in another location than the Courthouse. A reporter for the Daily Idahonian was present in the District Courtroom at the hour fixed, also apparently of the belief the hearing would be there. This was also true of a small audience. Since I feel I am not guilty of this charge, I have determined to file a motion to have the order of dismissal in this case set aside and a new time fixed for preliminary hearing, if the Prosecuting Attorney so desires.”

Mr. Tonkoff: That is all.

Redirect Examination

By Mr. Greene:

Q. Do you know whether any such motion was ever filed by Mr. Estes? A. I don't know.

Q. At whose request was this quotation from Mr. Estes printed in the paper?

A. At Mr. Estes' request.

Q. And did you print the entire statement as he gave it to you?

(Testimony of Louis A. Boas.)

A. I printed the entire statement as he gave it to me, yes. [281]

Q. How long prior to the time it was published that he gave it to you?

A. I believe it was that same morning and it was published in the afternoon paper the same day that he was in the office in the morning.

Mr. Greene: That is all.

Mr. Tonkoff: That is all.

The Court: We are going to adjourn at this time until 10:00 o'clock tomorrow morning. I might say to the jury at this time that Captain Thomas is no longer in this case. The fact that he is dismissed from this case is no inference at all that anyone else should remain in the case, or should not. Captain Thomas had nothing to do with the reporting of this article or writing the article in the papers and, therefore, he has been dismissed. Court will now adjourn until 10:00 o'clock tomorrow morning. The jury will be excused, but I will take up a matter with counsel in the absence of the jury.

(Whereupon the Court heard arguments of counsel concerning the admission of Exhibit No. 23.)

(Argument reported but not transcribed.)

The Court: I think I understand fully the position of each of counsel and I will look into this matter further and rule on it tomorrow morning. [282]

April 8, 1954, 10:00 A.M.

The Court: Exhibit No. 23 will be admitted in evidence.

Mr. Greene: May we read it at this time to the jury, your Honor?

The Court: Yes, you may.

Mr. Greene: I think perhaps it would be easier if someone sat in the witness chair and read the exhibit.

The Court: That would be entirely agreeable any way that you gentlemen decide. I always like to see an attorney on the witness stand anyway.

(Whereupon, the exhibit was read to the jury by Mr. Clements. Not included in this transcript by order of counsel for plaintiff.)

Mr. Greene: The defendants that I represent rest.

Mr. Clements: And that is true of the ones that I represent.

Mr. Tonkoff: We will call Judge Martinson in rebuttal. [283]

LLOYD G. MARTINSON

called by the plaintiff in rebuttal, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Are you the same Lloyd Martinson that testified here the other day? A. Yes, I am.

Q. Judge Martinson, I will ask you whether or

(Testimony of Lloyd G. Martinson.)

not a motion for dismissal was filed with you at the District Courthouse on the 13th day of January, 1953? A. Yes.

Q. Who brought the motion to the Courthouse?

A. Mr. Huff and Melvin Alsager.

Q. And what time of the day was that?

A. I cannot set the hour, but it was in the afternoon, the late afternoon, I remember that.

Q. And Mr. Huff was present?

A. Yes, sir.

Q. Will you state what was said by Mr. Alsager, the conversation there in your courtroom?

A. I don't remember too well. I remember that Mr. Huff and Mr. Alsager came in and Mr. Alsager had this paper in his hand. One or the other told me that they were filing a motion to dismiss. I believe that Mr. Alsager told me they were filing [284] a motion of dismissal.

Q. Did you file that motion?

A. Well, I remember that I was very reluctant to file it and I told them that at least since I had consulted with Mr. Shoup in my office before I took over the probate judgeship, that I was going to disqualify myself in this case and I told them that I was very reluctant, for that reason, to file that paper.

Q. How long was that motion in your office?

A. I know that it was in my office until the next day.

Q. Did you have any other conversation with Mr. Alsager concerning this motion to dismiss?

(Testimony of Lloyd G. Martinson.)

A. Yes; I remember after Mr. Huff left Mr. Alsager stayed around a little while longer and we discussed the filing of that motion, and I can't remember the nature of the conversation.

Q. Did he insist on your filing it?

A. Yes, he wanted it filed.

Q. Did you have any other conversation later?

A. I went down to his office; I think it was the next day. I can't remember just the time, but I believe that it was in the afternoon. I think it was after a Chamber of Commerce meeting but I can't be sure, but it seems to me that it was on Wednesday, yes, I know it was. I went into Mr. Alsager's office and I told him at the time that I had decided to disqualify myself and that I entirely disagreed with the [285] filing of that motion—I didn't feel that it should be filed and I told him that he should withdraw it—I permitted him to withdraw it.

Q. Did he tell you in this conversation that he was not going to appear at the hearing?

A. No, he did not tell me one way or the other.

Mr. Tonkoff: That is all.

Cross-Examination

By Mr. Greene:

Q. Who did you understand Mr. Huff was representing? Did you understand he was representing Mr. Estes?

Mr. Tonkoff: We object to what he understood, your Honor.

(Testimony of Lloyd G. Martinson.)

The Court: There is no question who he was representing.

Mr. Tonkoff: There will be as the testimony develops.

The Court: Certainly there is plenty of evidence to show that he was representing Mr. Estes. Go ahead; ask the question.

(Question read by reporter.)

A. I don't remember, your Honor, whether he told me who he was representing.

Mr. Greene: That is all. [286]

Mr. Tonkoff: That's all.

LAURENCE HUFF

called as a witness by the plaintiff, in rebuttal, having heretofore been duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. Your name is Laurence Huff and you are the same Mr. Huff who testified the other day?

A. Yes, sir.

Q. Mr. Huff, did you visit Mr. Alsager at his office on the 13th day of January, 1953?

A. I did.

Q. At that time were you requested by Mr. Estes or by anyone to appear on behalf of Mr. Estes?

A. I was not.

Q. What was the circumstances under which you appeared in his office?

(Testimony of Laurence Huff.)

A. I was the senior member of the bar at Moscow from a point of experience and age and Mr. Alsager, prior to that time, had consulted me frequently and asked my advice in regard to other matters in the law business. At this time I interested myself in the matter because of the effect of this charge on the public and on the members of the bar and I went voluntarily to Mr. Alsager's office. [287]

Q. And what conversation was had at his office concerning the motion for dismissal? Will you relate what was said in his office?

A. We had a considerable discussion and Mr. Alsager related to me the circumstances of this motion being filed immediately after his being sworn into office. He related to me the fact that he had not been consulted by the complaining witness or anybody prior to the time the motion was filed and was in doubt as to what to do about it. I related to him at that time the result of my knowledge of the case. There was a discussion between us as to who had probably drawn this criminal complaint and I related to him a conversation that I had had with Mr. Henry Felton of Lewiston just a few days previous in regard to the case. We studied this copy of this criminal complaint and in our discussion it was discussed as to whether or not this criminal complaint—I am talking about the criminal complaint now that was filed on the 12th day of January. As to whether or not—we discussed as to whether or not this criminal complaint actually charged any person, any individual, with the crime

(Testimony of Laurence Huff.)

of assault with a deadly weapon and while the complaint had charged that Mr. Estes had committed the assault with a deadly weapon, yet, in the complaint itself, it did not say upon whom the assault was committed. We referred to it at that time as double talk. Then there was a discussion as to what should be [288] done about it. I offered the discussion, that in starting out as Prosecuting Attorney, that he should make it clear to the people immediately that he was running his office and that someone else was not running his office for him. Behind the whole deal there appeared to be——

The Court: Let's have the facts only.

Mr. Huff: I beg the Court's pardon.

The Court: I can't see what this quarrel between the attorneys as to which one is a liar and which one is not a liar has to do with the issues in this case, but you go ahead, but let's cut it as short as possible.

Q. Who prepared the dismissal, Mr. Huff?

A. Mr. Alsager and I, in the back room of his office, discussed the dismissal and the terms of it and we penciled out a rough form of dismissal together.

Q. Where was it typed?

A. Mr. Alsager suggested to me that his stenographer was new and wasn't experienced and I offered to take it back to my office and put it in form.

Q. And did you return it?

(Testimony of Laurence Huff.)

A. I returned it that same afternoon as soon as it was put in form.

Q. Did you go to Judge Martinson's Court in the District Courthouse [289] and file that?

A. Yes, sir.

Q. Who was present?

A. I went with Mr. Alsager.

Q. At that time had you discussed with Mr. Estes concerning representing him?

A. I had not been called by Mr. Estes, that is, in the form of attorney and client.

Q. Did Mr. Alsager tell you whether or not he was going to appear?

A. Not at that conversation that afternoon.

Q. When did he tell you?

A. It was the next day.

Q. That was the 14th?

A. The 14th.

Q. What time of the day was it?

A. My best memory is that it was during the forenoon of the 14th.

Q. Was there any reason for you to appear with Mr. Estes the following morning, the 15th, at the District Court, were you representing him at that time?

A. I was not representing him at that time, no.

Q. Was there another motion for dismissal prepared?

A. I prepared a motion for dismissal—

Mr. Clements: We object to that as not [290]

(Testimony of Laurence Huff.)

proper rebuttal; there is only one motion for dismissal in evidence here.

The Court: Make it short and go ahead.

A. If I may state as being preliminary, Mr. Martinson had indicated on the afternoon before that he was going to disqualify himself and so from the previous motion of dismissal I made an exact copy changing the name of the Court and the name of the Justice.

Q. Did you deliver that to Mr. Alsager?

A. I talked to Mr. Alsager about it on the 14th.

Q. Did you deliver it to him?

A. I had the paper and discussed it with him on the 14th.

Q. Did you have any conversation with him at the time that you presented the second motion for dismissal as to whether or not he was going to appear?

A. At that time he informed me that he wasn't going to make a motion for dismissal but he didn't intend to make any appearance in the action.

Mr. Tonkoff: That is all.

Mr. Clements: No cross-examination.

Mr. Greene: I have one question.

Cross-Examination

By Mr. Greene:

Q. Mr. Huff, you heard the transcript of the preliminary [291] hearing read just a few moments ago, did you not? A. Yes.

(Testimony of Laurence Huff.)

Q. Are you the Mr. Huff referred to in that transcript? A. Yes.

Q. And were you representing Mr. Estes at that preliminary hearing?

A. Yes, at that second hearing, I was.

Mr. Greene: That's all.

Mr. Tonkoff: That is all.

WINN BLAKE

called by the plaintiff, as a witness in rebuttal, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. What is your profession, Mr. Blake?

A. Attorney at law.

Q. Where do you practice?

A. Lewiston, Idaho.

Q. Do you hold any official position?

A. Prosecuting Attorney of Nez Perce County.

Q. Were you Prosecuting Attorney of Nez Perce County in January of 1953? A. Yes, sir.

Q. That was in the same county, Nez [292] Perce? A. Yes, sir.

Q. Do you recall a telephone call from Mr. Alsager at Moscow? A. Yes, sir.

Q. What time did you receive that call?

A. Mel called me—it is difficult to fix the day, but it was the date that the article first appeared in the Tribune, I think, or the following day. He called me at home in the evening.

Q. And about what time?

(Testimony of Winn Blake.)

A. Early in the evening. I think around 6:30 or 7:00 o'clock.

Q. And will you state what conversation you had with him?

Mr. Clements: We object to that as incompetent, irrelevant and immaterial.

The Court: The objection is sustained.

Mr. Tonkoff: I would like to state this——

The Court: You can state, if you want to impeach Mr. Alsager, you can state to this witness Mr. Alsager's testimony and ask him if it was true. That testimony has no bearing in this case except for one thing and that is to impeach the integrity of Mr. Alsager.

Mr. Tonkoff: I thought I asked Mr. Alsager.

The Court: You asked Mr. Alsager but you didn't ask him the question that you had asked Mr. [293] Alsager nor did you give Mr. Alsager's answer. I remember Mr. Alsager's testimony. I was listening to it very carefully.

Mr. Tonkoff: Unfortunately, I cannot think of it at the moment, your Honor.

The Court: I can tell you what he said. He said that he couldn't remember just what he discussed with him on the telephone.

Mr. Tonkoff: Then I take the position that I could ask this witness the question. I had no other opportunity. A witness can always avoid impeaching questions by saying, "I don't remember."

The Court: Then this time he avoids it.

Mr. Tonkoff: All right. That is all, Mr. Blake.

The Court: You cannot impeach without getting the question exactly as to what was said.

TOM FELTON

called by the plaintiff as a witness in rebuttal, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Tonkoff:

Q. What is your profession, Mr. Felton? [294]

A. I am an attorney at law.

Q. Where do you practice?

A. Moscow, Idaho.

Q. Are you associated with anyone?

A. I am.

Q. With whom? A. With Murray Estes.

Q. Were you associated with him in January, 1953? A. I was.

Q. Did you, during the month of January, represent Mr. Estes in any proceeding? A. I did.

Q. Will you state which one it was?

A. I appeared as counsel on the original proceeding before Judge Borg when Mr. Estes was charged—there was a criminal complaint filed against Mr. Estes.

Q. What date was that, do you recall?

A. To the best of my recollection it would have been 1-15-53, on January 15, 1953.

Q. What time did you appear at the District Courthouse?

A. Not later than 8:50 of that morning.

(Testimony of Tom Felton.)

Q. How long did you remain there?

A. At least until—it was after 9:20 or 9:25.

Q. It was after 9:00 o'clock?

A. Yes. [295]

Q. Who was present when you arrived there?

A. I can definitely recall the young reporter. I think his name was Cassin, for the News Review, and three young chaps from the University, and there were other people present but exactly, I don't recall who they were. I wasn't paying any particular attention, outside of this chap that I knew.

Q. About a quarter after nine what did you do?

Mr. Clements: Now, if the Court please, we suggest that these are leading questions, directing his attention to a particular time.

The Court: Well, they are both lawyers. I think perhaps they should be allowed to do this. Go ahead. It seems to me that this case is developing into a trial of lawyers. I don't like to have the profession attacked so much.

A. May I have that question?

Q. Let me ask this: When did Judge Borg appear?

A. It was prior to 9:00 o'clock, as to the exact moment I didn't make any check on it, but I know it was prior to 9:00 o'clock.

Q. Was he there when you arrived?

A. I cannot recall at the moment.

Q. Did he subsequently arrive?

A. He was present when I was there and I know prior to 9:00 [296] o'clock.

(Testimony of Tom Felton.)

Q. What did you do after 9:00 o'clock?

A. Some time after 9:00 o'clock I made an original motion—wait a minute—some time after 9:00 o'clock I went into Martinson's office, that is Judge Martinson, and I telephoned to the jail.

Q. For what purpose?

A. To see if by any chance there was any witness over there.

Q. Were there any there?

A. There was no information given to me to that effect, no.

Q. What did you do then?

A. I came back into the courtroom and made a motion.

Q. And what was the substance of that motion?

A. To dismiss for the failure of proof.

Q. What time did you make that motion?

A. It was shortly after 9:00 o'clock; the exact time I don't recall the first time I made the motion.

The Court: Didn't you go into this in your case in chief? It seems that I remember the dismissal and all was gone into, the time and so forth.

Mr. Tonkoff: It has been testified to by Mr. Alsager that it was shortly after 9:00 and what I want to develop is the definite time.

The Court: Oh, you are still after Mr. Alsager. Go ahead. [297]

Mr. Tonkoff: No, your Honor, I am not after Mr. Alsager; I am not after anyone; I am just after the facts.

The Court: Go ahead.

(Testimony of Tom Felton.)

A. I made that motion to dismiss.

Q. And when did the Court grant the motion?

A. The Court refused to grant my first motion. He said we better wait a while.

Q. And when did he finally grant it?

A. To the best of my recollection it was at least a quarter after nine when I made that second motion and it was not granted immediately at that time.

Mr. Tonkoff: Your witness.

Mr. Greene: No questions.

Mr. Clements: I have no questions.

Mr. Tonkoff: I wonder if the Court was going to take a recess.

The Court: If you want a recess, yes. We will recess at this time until 2:00 o'clock this afternoon.

April 8, 1954, 2:00 P.M.

Mr. Tonkoff: That is all; the plaintiff [298] rests.

The Court: Do you have any surrebuttal?

Mr. Greene: None, your Honor.

Mr. Clements: None.

The Court: I will ask the jury to retire into the hall for a few minutes.

I excused the jury thinking perhaps you had some motions.

Mr. Greene: I did have a motion here I wanted to read into the record at this time.

The Court: Very well.

MOTION FOR DIRECTED VERDICT

Mr. Greene: At this time I would like to renew the motion that we made at the close of the plaintiff's case for a renewal of our motions to dismiss. In addition, I would like to move that the Court direct a verdict in favor of the defendants in each of the actions upon the following grounds:

First, that the alleged libelous matter—that the undisputed evidence shows that the alleged libelous matter in the issues of the two newspapers were true and correct reports of a matter of public concern, being a meeting at the school house in Moscow, Idaho, on the 12th of May, 1953. That the plaintiff has failed to prove any actual malice and the accounts being correct and true reports of what took place at that meeting are privileged.

Second, on the further ground that the undisputed [299] evidence shows that the matter alleged to be libelous is not libelous per se and in the absence of an allegation of special damages and a showing of malice it is not actionable.

Third, upon the ground that any proof of damages with respect to the plaintiff's reputation for truth and veracity is so nebulous and uncertain that it would not support a jury's verdict in favor of the Plaintiff.

Mr. Greene: I might say in support of that motion——

The Court: I don't care to hear any argument on this.

Mr. Greene: Very well, your Honor.

The Court: The Court will be in recess for ten minutes. [300]

April 8, 1954, 2:20 P.M.

RULING OF THE COURT

The Court: The two alternates are excused from further attendance in this matter.

Ladies and Gentlemen of the Jury: The Court has before it a Motion for a Directed Verdict upon the facts in this case. The evidence in this case has taken a very wide range during the past three and a half days, but it has been narrowed down to the question of whether the published articles of May 13, 1953, appearing in the Lewiston Morning Tribune and the Daily Idahonian were libelous and published with malice, or, in other words, were the articles themselves of a malicious nature, or were they intended to injure and damage the plaintiff by attacking his honesty, or even inferring that he was dishonest or unfit for the position he held.

In a determination of this question the articles as published must be taken as a whole, and then we must consider the intent of the publisher of the article. To do this we must go into the background or the reason for the meeting that was held, and which was reported and the report published the next day in the respective papers. We have evidence here of the incidents leading up to the meeting of the citizens, incidents beginning back in December of 1952, resulting [301] in complaints being filed charging Mr. Estes with a felony, to wit, Assault

with a deadly weapon; thereafter the matter was brought before a committing magistrate, certain actions were taken by the committing magistrate, apparently to the dislike of some citizens resulting in a great deal of discussion and newspaper articles in the *Spokesman-Review*, and, finally, a meeting held on May 12, 1953. Here the newspapers in question came into the picture, their reporters attended the meeting, reported the proceedings, and we must remember that the articles were a report of a meeting conducted by laymen, how else would laymen express their feelings; one utterance was, "Had this been an honest mistake," etc., this and other statements were honestly and fairly reported in these articles. Indeed, it appears to me that there must be considerable imagination injected into any consideration of this, to reach the conclusion that the articles were libelous—much less published with malice.

We must be careful in such matters lest we stifle the press and free speech; lest we find ourselves as many other people find themselves today, fearful of speaking—and having a press subservient to any certain group. [302]

The rule that you cannot criticize those in governmental positions is an old rule and does not exist in this land of ours. Judges and all public officers from the lowest public offices to the highest are subject to criticism, if the criticism is fair and honest. The people are vitally concerned in the conduct of those that are elected or appointed to public office. The interest of the public here outweighs the

interest of the plaintiff or any other individual. The protection of the public requires not merely discussions but information. Conduct and views which some disapprove and others approve are constantly imputed to our public officers. Errors of fact are inevitable and information and discussion will be discouraged and the public interest in public knowledge of important facts will be poorly defended if stating the facts fairly subjects the author or the newspaper publishing the comment to a libel suit without even showing an economic loss. Public interest outweighs the utterance or publication complained of. There can be no mistake that the author and publisher here stated the facts fairly and without malice.

It is unnecessary for me to comment on it, but I will say it was the duty of the Justice [303] Court, if he did not want to conduct the examination, to tell the Prosecuting Attorney that he wanted him to conduct it. If he did not tell him that he wanted him to conduct it, the Prosecuting Attorney did not appear. If he did not call the Prosecuting Attorney, then he should have called the witnesses and determined whether there was probable cause to hold the defendant for trial on the charge or dismiss it. Instead of trying to locate witnesses and call the county attorney to advise them that the hearing was being held, he summarily dismissed the case and by so doing he no doubt left himself open to criticism. Sometimes when criticism is made by laymen there may be some harsh statements made, but even lay-

men have a right to draw a reasonable inference from the facts.

Sometimes things happen that give the appearance of evil, and in the conduct of human affairs it is well to keep in mind that provision of the Scripture that says, "You should avoid the appearance of evil," and to my way of thinking that is particularly true of public officials, and it is well to remember that it would be a serious matter to lay down a rule of law that would make a citizen or [304] newspaper fearful of criticizing officials for permitting conditions of law enforcement to exist in a community that were unhealthy to its community life.

Our public officials should so conduct themselves as to not bring on such criticism. Everyone has a right to comment on matters of public interest and concern and criticize freely the acts of public officials with an honest purpose, however severe in terms, as long as the facts stated form a reasonable basis for the conclusion reached. I can find no evidence in the record that the articles in question were not fair comments on the conditions that existed at the time the articles were published. If I submitted this case to you, I would have to advise you that you must find malice on the part of the Publisher. Malice, as used in law of libel, means just about what it means to us in everyday speech. It means a wicked and perverse desire to inflict harm on a person for the sake of inflicting harm. Malice is ill will. There is nothing to show in this report of the public meeting and the evidence now before

us. The facts are just to the contrary. The Moscow paper published the statement of Mr. Estes word for word as he requested it, showing they were [305] willing to publish all the facts, even from Mr. Estes.

I am sorry in this case that it was necessary, or anyone felt it was necessary, to charge corruption, perjury, or attack the integrity and honesty of the members of this bar. I have been on this Bench for a long period of time, and I have felt that the Bar of Idaho was as fine a Bar as there could be anywhere. This case was presented by very able counsel. Mr. Tonkoff and myself have disagreed sometimes during the trial of this case as to the law. He may have been right and I may have been wrong, because he is one of the ablest counsel that the State of Washington has, and he comes to us from the State of Washington, and he comes to us with a reputation of honesty and integrity above reproach.

In our system of jurisprudence the Court has certain duties as well as the jury; one of those duties is to relieve the jury of the responsibility of passing upon questions where the evidence, in the Court's judgment, is insufficient to submit the matter to the jury. It would be rather foolish and ridiculous for me to submit this case to [306] you, and then say, as a matter of law, I would have to set your verdict aside unless it agreed with my opinion.

I am assuming that responsibility here, and in the foregoing statement I have endeavored to point out deficiencies in the evidence here to make out a case to submit to you as jurors. You will understand that you are assuming no responsibility here; it is

entirely the responsibility of the court. I am granting the Motion for an instructed Verdict.

Mr. Wayne Johnson, Juror number one, you will act as foreman for the jury and you will sign the verdict I have had prepared and which will be handed to you by the Bailiff.

I want to thank you for your careful attention to the evidence here.

Mr. Bailiff, show the verdict to counsel.

Ladies and Gentlemen of the Jury, again I want to say to you that it has been a real pleasure to have you here during this part of this term of court, and I appreciate getting better acquainted with you all. I want to thank you for the careful attention that you have given this matter all the way [307] through, and I hope that as you retire to your homes and places of business you will feel that the Court has acted conscientiously in accordance to what I felt was the just thing to do in this case.

Court will now be in recess. [308]

State of Idaho,
County of Ada—ss.

I, G. C. Vaughan, hereby certify that I am the official Court Reporter for the United States District Court in and for the District of Idaho, and

I further certify that I am the person who took in shorthand the evidence submitted and the proceedings had in and about the trial of the above-entitled cause, and

I further certify that I thereafter transcribed the same into longhand (typing) and that the foregoing transcript, consisting of pages numbered to 308, is a true and correct transcript of the evidence given and the proceedings had in and about the said trial.

In witness whereof I have hereunto set my hand this 28th day of July, 1954.

/s/ G. C. VAUGHAN,
Reporter.

[Endorsed]: Filed July 29, 1954.

[Endorsed]: Nos. 14469 and 14470. United States Court of Appeals for the Ninth Circuit. John K. Borg, Appellant, vs. Louis A. Boas and The News-Review Publishing Company, Inc., a Corporation, Appellees, and John K. Borg, Appellant, vs. The Tribune Publishing Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Idaho, Central Division.

Filed August 4, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.



IN THE

**United States Court
of Appeals**

FOR THE NINTH CIRCUIT

JOHN K. BORG,

Appellant,

vs.

LOUIS A. BOAS and THE NEWS-REVIEW
PUBLISHING COMPANY, INC., a Cor-
poration,

Appellees,

and

JOHN K. BORG,

Appellant,

vs.

THE TRIBUNE PUBLISHING COM-
PANY, a Corporation,

Appellee.

Nos.
14469
14470

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF IDAHO
CENTRAL DIVISION

BRIEF OF APPELLANT

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FILED

JAN 10 1955

PAUL P. O'BRIEN,
CLERK

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JURISDICTION

These actions were commenced in the Federal District Court by reason of diversity of citizenship. U.S.C.A. title 28, Sec. 1332. They were consolidated for trial by order of the court (R. 28). Plaintiff is a resident of the State of Washington; defendant corporations and the individual defendants are residents of Idaho, and the amount sued for in each action is in the sum of \$75,000.00, exclusive of interest and costs (R. 3-7).

These cases come within the appellate jurisdiction of this court upon appeal from final judgments in the actions at law or in equity. U.S.C.A. title 28, Sec. 1291. Final judgments and decrees were entered in the District Court on April 8, 1954. Notice of appeal therefrom was filed on May 7, 1954 (R. 17-19 and 19-21).

STATEMENT OF THE CASE

Appellant, John K. Borg, herein designated as plaintiff, brought the above actions for the recovery of damages resulting from the publication and circulation of libelous articles on May 13, 1953 by the respondents, T. C. Thomas, Louis A. Boas and the News Review Publishing Company, Inc., herein designated as defendants or referred to herein as Cause No. 1950, and T. C. Thomas and the Tribune Publishing Company, Inc., herein referred to as Cause No. 1951.

Plaintiff in brief alleges in Cause No. 1950—No. 14469

in this Court—among other things, that plaintiff is a resident of the State of Washington and that the defendants are residents of the State of Idaho and that the amount sued for, exclusive of interests and costs, is in the sum of \$75,000.00 (R. 3-6). That the defendants published and circulated of and concerning the plaintiff on May 13, 1953 a certain article which was false and untrue, particularly in the following respects:

“Thomas then made references to legal maneuvers in which a hearing was set for January 15 at 9 a. m. At 8 a. m. that day, Thomas explained, Alsager notified Judge John K. Borg that he would be ready at 9. Alsager and his witnesses were present at police court, normally the place where such hearings are held. But the judge and Estes, Thomas said, had gone to the county courthouse to hear the case.

“‘This was a ridiculous situation,’ said Captain Thomas. A motion for dismissal was made and it was dismissed. ‘If this had been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witnesses and come on over.’

* * * *

“‘But these things, Thomas said, ‘continue to disturb me’;

* * * *

“‘3. The extraordinary circumstances in which the first felony was dismissed.

“‘4. Circumstances of the dismissal of the second charge against Estes.

* * * *

“‘There is no way to get justice or to correct the faults in the administration of justice * * * without a grand jury,’ Thomas concluded.” (R. 5, 6; Ex. 1).

By reason of the circulation of the foregoing article, plaintiff was deprived of public confidence and suffered embarrassment and was held in contempt and obliquy in the estimation of his friends and acquaintances (R. 6).

Thereafter separate answers were filed by the defendants admitting that the controversy, exclusive of interest and costs, exceeds the amount of \$3,000.00 (R. 7) and the publication and circulation of the article complained of by the plaintiff (R. 8); and as an affirmative defense allege that the complaint fails to allege a cause of action. That the article was a fair report of a public meeting held by citizens at the Moscow High School on May 12, 1953 for the purpose of discussing subjects and proceedings of public, official and judicial proceedings pending in the courts of Latah County; that the article was true in fact and the expressions and opinions are fair and impartial comments made in good faith without malice upon a matter of public interest (R. 12, 13).

In action No. 1951—No. 14470 in this Court—wherein T. C. Thomas, and the Tribune Publishing Company, Inc., are defendants, plaintiff's complaint is identical with Cause No. 1950, with the exception that the excerpts of the

article, which plaintiff complains are false and untrue read as follows:

“The meeting opened with a long and detailed review of the Estes-Shoup case by Capt. Thomas C. Thomas, commander of the University Naval ROTC unit, of which Shoup was a member.

“Captain Thomas declared that ‘I don’t like the smell of it. I don’t think we have here in this county now the proper administration of justice.’

* * * *

“Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol.

* * * *

“Legal maneuvers had made it impossible for the prosecuting attorney to get a trial on that charge.

* * * *

“At 9 a. m., he added, the prosecuting attorney and witnesses and the court reporter appeared at the police court, normally the place where the hearing would be held. But the judge and Estes had gone in the meantime to the district courtroom to hear the case.

“‘This was a ridiculous situation,’ Thomas said.

“‘Counsel for Estes moved that the case be dismissed and it was. If this had been an honest mistake, it could have been rectified simply by lifting a telephone and telling the prosecuting attorney to bring his witnesses and come on over.

* * * *

"But Thomas said these things disturbed him:

* * * *

"The extraordinary circumstance of dismissing the first battery charge while the prosecutor was in the regular courtroom and the judge and defendant were in another;

"Circumstances of the dismissal of the second charge against Estes;

* * * *

"What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we'd go through this same rigamarole. There is no way to get justice or to correct the faults in the administration of justice in Latah County without a grand jury.'" (R. 5, 6; Ex. 6).

The defendants interpose substantially the same defenses as in Action No. 1950. (R. 8-16).

These actions came on for trial to a jury (R. 25-28), and the undisputed testimony discloses that plaintiff, John K. Borg, was first appointed Justice of the Peace in Moscow, Idaho in 1944, and had been elected and re-elected and acting as such on May 13, 1953. Prior to 1953 the plaintiff had also occupied the position of Police Judge, but on or about November 15, 1952 he gave up this position (R. 52) and during his position as Police Judge he held court on traffic violations at the police station

(R. 82), but matters in the justice court concerning preliminary hearings were always held at the courthouse (R. 46, 61, 62, 76, 112, 123). Plaintiff was also employed at the Elks Club. (R. 45).

On January 15, 1953, the plaintiff having given up the office of Police Judge, had no office at the police station. The police court was entirely inadequate to hold preliminary hearings because it was a small room approximately 12 by 12, containing two desks and 6 or 7 chairs (R. 74, 120, 124, 200, 201).

Melvin Alsager, a practicing attorney, was sworn in as Prosecuting Attorney of Latah County on January 12, 1953 (R. 152). At the same time Lloyd G. Martinson was sworn in as Probate Judge. Within 15 minutes after Judge Martinson had taken office, Judge Martinson called Mr. Alsager and advised him that a criminal complaint had been filed (R. 64, 153) by Henry Felton (not a partner of Mr. Estes) of Lewiston, Idaho (R. 185, 186, 191, 194, 195).

At about 5 o'clock in the afternoon of January 13, Mr. Alsager appeared in Judge Martinson's office where the criminal cases were filed and discussed the filing of the complaint against Mr. Estes, a practicing attorney in Moscow, who was charged with accosting Richard Shoup with a deadly weapon, at which time Judge Martinson advised Mr. Alsager that he had disqualified himself (R.

160), but that the hearing had been set at 9 o'clock a. m., January 15, 1953 (R. 197), and that he had changed the venue of the matter to plaintiff's court (R. 160, 162).

Mr. Alsager discussed the filing of the complaint over the phone with Mr. Clements, opposing counsel in this action, Mr. O'Donnell, the former Prosecuting Attorney of Latah County, and Mr. Wynne Blake, Prosecuting Attorney at Lewiston, Idaho (R. 184, 203, 210, 211, 280).

In the afternoon of January 14, while plaintiff was working at the Elks Club, Judge Martinson gave him the file of *State vs. Estes* and advised him that he had disqualified himself to sit as judge and had transferred the venue of the action to Justice Court over which plaintiff was presiding for preliminary hearing and that the matter was set for hearing at 9 o'clock a. m., January 15, 1953 (R. 47, 52, 65).

Shortly after Judge Martinson had departed from the Elks Club, Mr. Alsager called upon plaintiff and discussed the Estes case with the plaintiff and advised him that he would not appear at the hearing the following morning (R. 52, 53, 79, 81, 88, 89). Mr. Alsager inquired of the plaintiff if he would require him as Prosecuting Attorney to attend the hearing, to which inquiry the plaintiff answered "No." (R. 163).

Section 31-2604 of the Idaho Code provides that a

Prosecutor does not need to appear unless called upon to do so by the Court (R. 198, 199).

On the 14th of January, 1953, Mr. Lawrence Huff, who is described as the Dean of the Moscow Bar, took an interest in the charge against Mr. Estes, who is also a practicing attorney, and discussed the charge filed against Mr. Estes with Mr. Alsager (R. 275, 276) at which time Mr. Alsager stated to Mr. Huff and advised him that he had not been consulted by the complaining witness nor anyone else prior to the time of the filing of the charge and that the criminal complaint drawn by Henry Felton of Lewiston, Idaho was faulty. After this discussion Mr. Alsager concluded that he would make a motion for the dismissal of the complaint and the motion for dismissal was prepared by Mr. Alsager and Mr. Huff and delivered to the court house to Judge Martinson's office for filing in the forenoon of the 14th of January, 1953, at which time Mr. Alsager advised that he would not appear at the hearing the following morning (R. 278, 279).

On the morning of January 15, 1953 Mr. Estes and his partner, Mr. Tom Felton, appeared at the courthouse, where there were a number of people congregated, including Mr. Fred Cassin, the Idahonian reporter. Neither the Prosecuting Attorney nor the complaining witness appeared at 9 o'clock to attend the preliminary hearing, and at about 9:15 a motion for dismissal was made on behalf

of Mr. Estes by Mr. Tom Felton, his associate (R. 236). Dismissal was denied until a check was made with the Sheriff's Office, which is next door to the courthouse, for witnesses who might appear against Mr. Estes; none were found; the motion for dismissal was renewed and granted at about 9:25 (R. 54, 93, 94, 106, 282-285).

In the meantime Mr. Alsager had changed his mind about attending the hearing and had congregated his witnesses and was waiting for trial at the police court (R. 167). Fred Cassin, reporter for the Daily Idahonian, was at the courthouse and remained there until the matter was disposed of (R. 223-226). The dismissal was granted on account of lack of evidence and the failure of the Prosecuting Attorney to attend (R. 226, 227).

Thereafter other charges were filed against Mr. Estes, and Mr. Louis A. Boas, one of the defendants and editor of the Idahonian, was familiar with the proceedings and particularly familiar with the fact that Mr. Estes had agreed to consent to a setting aside of the order of dismissal of January 15, 1953 and that the matter be heard as though no order of dismissal had been entered (R. 32, 33, 268).

On May 12, 1953 a public gathering was had at the high school, at which time one of the defendants, T. C. Thomas, was the chairman and chief speaker. The reporters for the defendants had reported said hearing,

which resulted in the publication and circulation of the articles upon which these actions are based. Mr. Boas was familiar with the Estes-Shoup situation, the paper having published previous articles concerning the order of dismissal on January 15, 1953 and again of another dismissal on April 19, 1953 (R. 31-35).

It appeared from the evidence that the Idahonian daily circulation was 4200 with approximately 12,000 readers (R. 30). An offer in evidence was made of articles published by the Idahonian commenting upon the plaintiff's conduct in dismissing the matter for the purpose of showing malice upon the part of the defendants. The introduction into evidence of said articles was objected to and the objection was sustained by the court (R. 32, 34-40). At this juncture counsel for plaintiff desired to argue the basis for the admission of said articles, and the following transpired:

“MR. TONKOFF: Your Honor, it is offered in evidence for another purpose which I think I could make clear if Your Honor wanted me to make a statement in the presence of the jury, but I hesitate to do so.

“THE COURT: I am not afraid of this jury, you can make your statement in their presence.”

Counsel then advised the Court that reference by the Idahonian concerning plaintiff and the Estes matter had been made on 13 occasions and that the evidence is for

the purpose of showing malice and for a basis of punitive damages (R. 35, 36). Examining the articles (R. 36; Ex. 2, 3, 4, 5):

“THE COURT: The objection will be sustained. I can't see anything in these articles but news, there is nothing to show any malice. There is nothing here to show any malice on the part of this witness (R. 36).

“MR. TONKOFF: If the Court please, I base my contention on the ruling in the case - -

“THE COURT: The Court has ruled (R. 38).

The Lewiston Morning Tribune has a daily circulation through central Idaho of 14,500 or about 40,000 readers. The article in Cause No. 1951 as well as Cause No. 1950 was authorized by the publishers (R. 41-43; Ex. 6). For the purpose of proving malice by reason of subsequent publications concerning the order of dismissal of January 15, 1953, Mr. William F. Johnston, Managing Editor of the Lewiston Morning Tribune, was interrogated:

“Q. Has the paper referred to the dismissal of the judgment by Judge Borg in the case of State vs. Estes between January 15, 1953 and May 13, 1953?

“MR. CLEMENTS: We object to that as being immaterial.

“THE COURT: The objection will be sustained.” (R. 44).

Immediately after the appearance of the article of May 13, 1953, plaintiff noticed a change in his friends' attitude toward him. His friends and acquaintances shunned, walked away from and were frigid toward him (R. 72). He became nervous and lost considerable sleep and suffered headaches and finally in September, 1953, moved to Pullman, Washington (R. 73).

He received anonymous letters and phone calls, and particularly one from Kate Smith, who inquired of plaintiff over the phone as to why he had not reported the money he had received from Estes for disposing of the case. Other unidentified calls were received by plaintiff within the week (R. 55, 56), most of which concerned themselves with money received by plaintiff for the Estes dismissal; how much money he had received and if he had entered it in his income tax report. Objections were made to this type of testimony after it had been received, and the following transpired:

"MR. TONKOFF: Will you state what was said to you at the time of the calls?

"MR GREENE: Now we object to that as hearsay and not in the presence of any of the defendants and not binding upon them in any way. (in the presence of the jury)

"MR. TONKOFF: This, Your Honor, is the exception to the rule.

"THE COURT: I will let him answer, certainly these

defendants should not be responsible for any telephone calls they didn't have anything to do with (R. 35).

"THE COURT: We have a lot of calls all mixed up here, we don't know which he is talking about.

"THE COURT: Well, in the first place, the defendants could have no way in the world of meeting this evidence. In the second place there is nothing to show that these articles in the newspaper were the cause of it. This was a matter of public concern and they might have had information from attending the meeting themselves. There is nothing to show that any of these conversations that he had or any of the calls that he received or any of the letters were on account of the articles in the newspaper." (R. 54-57).

Concerning the receipt of the anonymous letters (R. 56):

"THE COURT: I think it is highly prejudicial testimony to be allowed in, he is testifying about something that may not have had anything to do with the articles in the newspaper * * *

"THE COURT: * * * the letters being written or the calls being made to the witness would be just speculation and pure guess (R. 58).

"THE COURT: And the testimony in regard to the telephone conversations and the letters will be stricken and the jury instructed to disregard that." (R. 59).

Roy D. Guernsey, a tavern operator at Oniwah (R. 68) read the article in the Daily Idahonian, and the following question was propounded to the witness:

“Q. What impression did you derive from it concerning Judge Borg?”

“MR. GREENE: I will have to object to that as being purely a conclusion on the part of the witness.

“THE COURT. The objection will be sustained.”
(R. 69).

Mr. Guernsey was asked concerning a conversation with Sergeant Clink, who on Sunday after the article appeared had a conversation with Mr. Guernsey at his place of business (R. 69).

“Q. Will you state what was said concerning the article and concerning the plaintiff?”

“MR. GREENE: We object to that as hearsay and as a self-serving declaration and no proper foundation is laid and it does not tend to prove any issue in this case.

“THE COURT: The objection is sustained.

“MR. TONKOFF: I would like to make an offer of proof.”

And in the absence of the jury the following offer of proof was made:

“The plaintiff offers to prove through this witness that after reading the article he was impressed with the fact that Judge Borg was corrupt and dishonorable and that he derived that opinion solely from reading the article which is the subject matter of this litigation, which article appeared in the Daily Idahonian May 13, 1953. Plaintiff offers to prove further through this witness that a discussion was had with

Sergeant Clink attending the University, who was in his place of business the following Sunday, at which time he inquired of this witness if he had read the article and that Sergeant Clink made the statement to this witness that after examining and reading the article there was no doubt but that the judge was dishonest and corrupt.

“I base the admissibility of this evidence on 12 A.L.R. Second,—I have indicated on the page,—(R. 69, 70).

“THE COURT: The offer of proof will be rejected.

“MR. TONKOFF: I have two or three other witnesses who would testify along the same line, and in the absence of the jury I would like to make an offer of proof as to their testimony.

“THE COURT: It will be understood that the offer has been made and the same rule by the court.

“MR. TONKOFF: Those witnesses, for the record, are Roland Noland, Tom Campbell and Mr. Nerk.” (R. 70, 71).

Yet contrary to this ruling, the trial court admitted the testimony of Judge A. L. Morgan, without provocation prefacing his ruling with the following remark:

“THE COURT: I don’t see why this would mean anything one way or another. I will let you read it, you may go ahead with the questions I have examined from Pages 8 to 10 inclusive. You may go ahead with all of the testimony there in the depositions.” (R. 132).

In brief, the testimony was as follows:

“Q. You referred to one of the nurses remarking that

there must have been something crooked in connection with all lawyers getting off. Were similar remarks made in the discussion by other persons? (R. 26).

“A. With reference to other people, a number of them did inquire as to just why a lawyer could get away with a matter of that kind or a judge would dismiss a case under the circumstances outlined in that article.” (R. 134).

The plaintiff attempted to introduce expert testimony as to the procedure and the manner in which preliminary hearings are disposed of when the complaining witness and the Prosecutor do not appear, contending that expert testimony is for the purpose of informing the jury of a technical matter.

“MR. TONKOFF: (Q) Now, Judge Borg, when a witness does not appear, and I am talking about the complaining witness now, and a motion is made for dismissal, with nobody present to represent the defendant, will you tell what is the proper procedure?”

“MR. GREENE: We object to that as calling for a conclusion of the witness and invading the province of the jury (R. 58).”

“MR. TONKOFF: I assume, Your Honor, that Judge Borg is an expert on this and I refer Your Honor respectfully to Vol. 243 of the Pacific. Just a moment, I have the citation here which in my opinion allows such testimony to be introduced and - - -

“THE COURT: I think, Mr. Tonkoff, that it would be

error under the circumstances here to admit such testimony and I will sustain the objection.” (R. 74, 75).

Along the same line, for the same purpose, Mr. Lawrence Huff, the senior member of the Moscow Bar, was asked:

“Q. You are familiar with preliminary hearings, are you not, as a practicing attorney?”

“A. Yes, sir.

“Q. Would you state what the procedure is when a complaining witness does not appear at a preliminary hearing?”

“MR. GREENE: We object to that as calling for a conclusion of the witness on a matter of law and invading the province of the jury.

“THE COURT: The objection will be sustained.

“Q. Mr. Huff, does a Prosecutor appear at all preliminary hearings?”

“MR. GREENE: We object to that, if the court please, as being immaterial and not tending to prove or disprove any issue in this case.

“THE COURT: He didn’t appear at this one (R. 114).

“MR. TONKOFF: I am trying to find out what the procedure is and I think as an expert he should be allowed to answer the question. I don’t know what Your Honor’s rule is on the matter, that is the purpose of this question, to find out what the practice is, I think it is quite important.

“THE COURT: I can tell you what the practice is, the Prosecuting Attorney has to be at a prelim-

inary hearing if one is held, or have an assistant there. We don't need to testify to that.

"MR. TONKOFF: I would like to cite you the statute on that.

"THE COURT: I will let him answer. I know what it is.

"Q. Is there a statute in that respect concerning the appearance of the Prosecuting Attorney at preliminary hearings?

"A. I find myself in a very embarrassing position and I am very reluctant to answer in view of the statement of His Honor." (R. 115).

On cross examination Mr. Alsager was asked if he had phoned Prosecuting Attorney Wynne Blake in Lewiston, Idaho on the evening of the 14th to consult with him concerning the pending action of January 15, 1953.

"Q. Now isn't it a fact that you made a call to Winn Blake, the Prosecuting Attorney, at Lewiston, Idaho, Nez Perce County, on the 14th day of January, 1953?

"A. I may have made a call, I don't recall it necessarily but then it may have been, although it doesn't stand out in my mind at this time I may have.

"Q. And you called him for the specific purpose of getting information on the Estes case?

"A. I may have called him, yes, I don't recall it exactly now.

“Q. Your testimony is that you may have called him?

“A. Yes, I don’t deny that I called him.

“Q. For what purpose did you call him except about the Estes case, that is on January 14?

“A. If I did call him, it may have been in connection with this case. Blake and myself call back and forth in the last year and a half. We consult one another on different matters here but it may have been in connection with this case alright.

“Q. Did you consult with him with relation to this case?

“A. I may have, yes.

“Q. Do you remember the advice he gave you?

“A. Well of course I don’t even remember any conversation with him.

“Q. Do you have any distinct recollection of your conversation with Mr. Clements?

“A. Only to the extent that I told you about, yes, that is all.

“Q. Isn’t it a fact that Mr. Blake told you that Henry Felton had prepared the complaint and for you to ignore it?

“A. I don’t recall that, no.

“Q. Do you recall any of the conversation?

“A. No, I do not, not even my own conversation.

“THE COURT: Well, counsel is making quite an effort here to see if he can mix this witness up, I will let him go. I don’t know whether counsel has ever been on the witness stand or not, but I have and I know it is a pretty hard thing to contend with a lawyer sometimes when you are on the stand.” (R. 210, 211).

In order to meet this testimony, Wynne Blake was called, who identified himself as Prosecutor of Nez Perce County, residing at Lewiston, Idaho (R. 280).

“Q. Do you recall a telephone call from Mr. Alsager at Moscow?

“A. Yes, sir.

“Q. * * * and about what time?

“A. Early in the evening, around 6:30 or 7:00.

“Q. And will you state what conversation you had with him?

“MR. CLEMENTS: We object to that as incompetent, irrelevant and immaterial.

“THE COURT: The objection is sustained.

“THE COURT: You can state if you want to impeach Mr. Alsager, you can state to this witness Mr. Alsager’s testimony and ask him if it was true. That testimony has no bearing in the case except for one thing and that is to impeach the integrity of Mr. Alsager.

“MR. TONKOFF: I thought I asked Mr. Alsager.

“THE COURT: You asked Mr. Alsager but you didn’t

ask him the question that you had asked Mr. Alsager nor did you give Mr. Alsager's answer. I remember Mr. Alsager's testimony, I was listening to it very carefully.

"THE COURT: I can tell you what he said, he said that he couldn't remember just what he discussed with him on the telephone.

"MR. TONKOFF: Then I take the position that I could ask this witness the question. I had no other opportunity, a witness can always avoid impeaching questions by saying, 'I don't remember.'

"THE COURT: Then this time he avoids it." (R. 280, 281).

While Mr. Tom Felton, associate of Mr. Estes, was on the stand (R. 282) he was asked concerning the time he made the motion for dismissal:

"Q. What time did you make that motion?

"A. It was shortly after 9 o'clock, the exact time I don't recall the first time I made the motion.

"THE COURT: Didn't you go into this in your case in chief? It seems to me that I remember the dismissal.

"MR. TONKOFF: It has been testified to by Mr. Alsager that it was shortly after 9, though I want to develop some definite time.

"THE COURT: Oh, you are still after Mr. Alsager, go ahead." (R. 284).

After E. D. Hill had testified on behalf of the de-

fendant, plaintiff's counsel had no reason to cross-examine, and the following took place:

"MR. TONKOFF: No questions.

"THE COURT: Mr. Hill, I might tell you that you got off easy." (R. 222).

At the conclusion of the plaintiff's testimony, motion for directed verdict was made and denied (R. 147-151). At the conclusion of all the testimony a motion was made for directed verdict, which was granted (R. 285, 286), and the Court granted the same in the following language (R. 287-292):

"The evidence in this case has taken a very wide range during the past three and a half days, but it has been narrowed down to the question of whether the published articles of May 13, 1953, appearing in the Lewiston Morning Tribune and the Daily Idahoian were libelous and published with malice, or in other words, were the articles themselves of a malicious nature, or were they intended to injure and damage the plaintiff by attacking his honesty, or even inferring that he was dishonest or unfit for the position he held.

"In a determination of this question the articles as published must be taken as a whole, and then we must consider the intent of the publisher of the article. To do this we must go into the background or the reason for the meeting that was held, and which was reported and the report published the next day in the respective papers. We have evidence here of the incidents leading up to the meeting of the citizens, incidents beginning back in December of 1952, resulting in complaints being filed charging Mr. Estes

with a felony, to-wit, Assault with a deadly weapon; thereafter the matter was brought before a committing magistrate, certain actions were taken by the committing magistrate, apparently to the dislike of some citizens resulting in a great deal of discussion and newspaper articles in the *Spokesman-Review*, and finally a meeting held on May 12, 1953. Here the newspapers in question came into the picture, their reporters attended the meeting, reported the proceedings, and we must remember that the articles were a report of a meeting conducted by laymen, how else would laymen express their feelings, one utterance was 'Had this been an honest mistake' etc., this and other statements were honestly and fairly reported in these articles. Indeed it appears to me that there must be considerable imagination injected into any consideration of this, to reach the conclusion that the articles were libelous—much less published with malice.

"We must be careful in such matters lest we stifle the press and free speech; lest we find ourselves as many other people find themselves today, fearful of speaking—and having a press subservient to any certain group.

"The rule that you cannot criticize those in governmental positions is an old rule and does not exist in this land of ours. Judges and all public officers from the lowest public offices to the highest are subject to criticism, if the criticism is fair and honest. The people are vitally concerned in the conduct of those that are elected or appointed to public office. The interest of the public here outweighs the interest of the plaintiff or any other individual. The protection of the public requires not merely discussions but information. Conduct and views which some disapprove and others approve are constantly imputed to our public officers. Errors of fact are inevitable and information and discussion will be discouraged and

the public interest in public knowledge of important facts will be poorly defended if stating the facts fairly subjects the author or the newspaper publishing the comment to a libel suit without even showing an economic loss. Public interest outweighs the utterance or publication complained of. There can be no mistake that the author and publisher here stated the facts fairly and without malice.

“It is unnecessary for me to comment on it, but I will say it was the duty of the Justice Court, if he did not want to conduct the examination, to tell the Prosecuting Attorney that he wanted him to conduct it. If he did not tell him that he wanted him to conduct it, the Prosecuting Attorney did not appear. If he did not call the Prosecuting Attorney then he should have called the witnesses and determined whether there was probable cause to hold the defendant for trial on the charge or dismiss it. Instead of trying to locate witnesses and call the county attorney to advise them that the hearing was being held, he summarily dismissed the case and by so doing he no doubt left himself open to criticism. Sometimes when criticism is made by laymen there may be some harsh statements made, but even laymen have a right to draw a reasonable inference from the facts.

“Sometimes things happen that give the appearance of evil, and in the conduct of human affairs it is well to keep in mind that provision of the Scripture that says, ‘You should avoid the appearance of evil’ and to my way of thinking that is particularly true of public officials, and it is well to remember that it would be a serious matter to lay down a rule of law that would make a citizen or newspaper fearful of criticizing officials for permitting conditions of law enforcement to exist in a community that were unhealthy to its community life.

“Our public officials should so conduct themselves

as not to bring on such criticism. Everyone has a right to comment on matters of public interest and concern and criticize freely the acts of public officials with an honest purpose, however severe in terms, as long as the facts stated form a reasonable basis for the conclusion reached. I can find no evidence in the record that the articles in question were not fair comments on the conditions that existed at the time the articles were published. If I submitted this case to you, I would have to advise you that you must find malice on the part of the Publisher. Malice as used in law of libel means just about what it means to us in everyday speech. It means a wicked and pervert desire to inflict harm on a person for the sake of inflicting harm. Malice is ill will. There is nothing to show in this report of the public meeting and the evidence now before us. The facts are just to the contrary. The Moscow paper published the statement of Mr. Estes word for word as he requested it, showing they were willing to publish all the facts, even from Mr. Estes.

"I am sorry in this case that it was necessary, or anyone felt it was necessary, to charge corruption, perjury, or attack the integrity and honesty of the members of this bar. I have been on this Bench for a long period of time, and I have felt that the Bar of Idaho was as fine a Bar as there could be anywhere. This case was presented by very able counsel. Mr. Tonkoff and myself have disagreed sometimes during the trial of this case as to the law. He may have been right and I may have been wrong, but he is one of the ablest counsel that the State of Washington has, and he comes to us from the State of Washington, and he comes to us with a reputation of honesty and integrity above reproach.

"In our system of jurisprudence the Court has certain duties as well as the jury, one of those duties is to relieve the jury of the responsibility of passing upon

questions where the evidence, in the Court's judgment, is insufficient to submit the matter to the jury. It would be rather foolish and ridiculous for me to submit this case to you, and then say as a matter of law I would have to set your verdict aside unless it agreed with my opinion.

"I am assuming that responsibility here, and in the foregoing statement I have endeavored to point out deficiencies in the evidence here to make out a case to submit to you as jurors. You will understand that you are assuming no responsibility here; it is entirely the responsibility of the court. I am granting the Motion for an instructed Verdict."

SPECIFICATION OF ERRORS

The district court erred as follows:

1. The court erred in rejected Exhibits No. 2, 3, 4, and 5 offered in evidence by the plaintiff, the same being other newspaper articles on the same subject published by the defendants (R. 35-40, 44).

2. The court erred in sustaining defendant's objections to plaintiff's offer of evidence to establish the circulation of the articles complained of, and the impression and understanding created by such articles upon the readers thereof (R. 57-59, 69-75).

3. The court erred in excluding plaintiff's evidence to show the procedure in a preliminary hearing when the prosecuting attorney and complaining witness fail to appear (R. 74, 75, 114, 115).

4. The court erred in excluding rebuttal testimony

of Wynne Blake, Prosecuting Attorney of Nez Perce County (R. 280-282).

5. The court erred in its unprovoked remarks throughout the trial not pertaining to the evidence or the issues in the case which were highly prejudicial to the plaintiff.

6. The court erred in permitting into evidence Exhibit No. 23 over plaintiff's objections (R. 272-273).

7. The court erred in each action in granting defendants' motion for directed verdict, and in directing the entry of judgment in favor of the defendants in accordance with such verdict (R. 285-292).

8. The court erred in entering judgment of dismissal in each action in favor of the defendant (R. 17, 19).

9. The court erred in failing and refusing to submit each action to the jury for its verdict.

A R G U M E N T

I.

THE COURT ERRED IN RULING THAT THE ARTICLES PUBLISHED BY THE DEFENDANTS ARE NOT LIBELOUS AND THEREBY DIRECTING A VERDICT IN DEFENDANTS' FAVOR.

It is conceded that the publication of the articles which are the basis of these actions was authorized by the defendant corporations' agents (R. 40, 43).

Definitions of libel vary in phraseology, and attempt-

ed definitions are practically innumerable. None have been so comprehensive and accurate as to encompass all cases that might arise.

Some courts, including Idaho, have adopted and patterned civil liability for libel upon the penal statute. *Sweeney v. Capital Pub. Co.*, 37 Fed. Sup. 355. The decisions cited in the foregoing case hold that it is a libel to charge one with any crime, corruption, fraud, dishonesty or any moral or vicious practice or unworthiness to hold office or to malign anyone in his profession.

The same ruling is found in *Jenness v. Co-op Pub. Co.*, 36 Ida. 697, 213 Pac. 351. In this case libel is defined in the penal statute, Sec. 18-4801, I.C., as:

“ * * * malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or punish the natural or alleged defects, of one who is alive, and thereby to expose him to public hatred, contempt or ridicule.” *Gough v. Tribune Journal Co.*, 249 P. (2d) 192, 73 Ida. 173.

This case has adopted the following language defining libel:

“In 53 C.J.S., Libel and Slander, Par. 13, p. 59, the author states the rule as follows:

“In order to be libelous per se, the defamatory words must be of such a nature that the court can presume as matter of law that they will tend to disgrace and degrade the person or hold him up to public hatred,

contempt, or ridicule or cause him to be shunned and avoided; in other words, they must reflect on his integrity, his character, and his good name and standing in the community, and tend to expose him to public hatred, contempt or disgrace. The imputation must be one which tends to affect plaintiff in a class of society whose standard of opinion the court can recognize.”

In the case of *Dwyer v. Libert*, 30 Ida., 576, 167 Pac. 651, it is said:

“To charge a man in a written publication with willful falsehood in the matter of a serious business transaction must necessarily expose him to contempt and have a tendency to lower him in the common estimation of citizens.”

“A libelous writing must be considered in its natural and obvious sense and in the sense in which the words used would ordinarily and reasonably be understood by the readers of the publication, without regard to the conclusions of the pleaders. It must be considered as a whole and not in part or parts detached from the main body of the publication.” *Gaffney v. Scott Pub. Co.*, 35 Wn. (2d) 272, 212 P. (2d) 817; *Roane v. Columbian Pub. Co.*, 126 Wash. 416, 218 Pac. 213; *Blende v. Hearst Publications*, 200 Wash. 426, 93 P. (2d) 733, 124 A.L.R. 549.

And the fact that true statements are interspersed throughout the article makes it nonetheless damaging in its effect nor do any such statements relieve the defendant from liability. *Miles v. Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847; *Ward v. Painters Local No. 300*, 41 Wn. (2d) 859, 252 P. (2d) 353; 33 Am. Jur. 161 (Libel and Slander) Sec. 169, 3 Restatement of Torts 169, 174, Sec. 569 and

607; *Hubbard v. Allyn*, 86 N. E. 356; *Snyder v. N. Y. Press Co.*, 121 N. Y. Sup. 944.

The defendant in *Gaffney v. Scott Pub. Co.*, *supra*, charged the plaintiff as Prosecutor of Franklin County of shielding the criminal element at Pasco, Washington by failing to make a proper effort to bring the criminals to justice and that his attitude toward the criminal element was of such a friendly character that he would not cooperate with other law enforcing officials. The court stated:

“The law properly gives to the public press encouragement to voice its criticism of the conduct of public officials; but, in the exercise of such privilege, a publication which imputes to them misconduct in office, want of official integrity or infidelity to public trust, if possible, is a violation of that privilege and gives rise to an action for damages.”

In the case of *Lynch v. Republic Publishing Co.*, 40 Wn. (2d) 379, 243 P. (2d) 636, plaintiff was running for re-election for Justice of the Peace. The defendant in substance published an editorial that stated that plaintiff was not qualified to act as judge and did not assure fair and just trials for defendants appearing in his court. The court held that attacking the plaintiff in such manner was libelous per se.

In *Otero v. Ewing*, 110 So. 648, 56 A.L.R. 249, the plaintiff was running for election to judgeship. The article written by the defendant reflected upon the character and

reputation of the plaintiff as a man and as a lawyer and was calculated to injure him and to expose him to public hatred, contempt and ridicule and was therefore libelous per se.

In *Cook v. East Shore Newspapers, Inc.*, 327 Ill App. 559, 64 N. E. (2d) 751, the defendant charged the plaintiff while holding the position of judgeship with misconduct in office. The court held that that was libel per se in the absence of proving the truth of the charges.

In *Washington Times Co. v. Bonner*, 66 App. D. C. 280, 86 F. (2d) 836, 110 A.L.R. 393, the defendant charged the plaintiff with violations of his duties while he was employed by the United States Federal Power Commission. Such charges were considered libelous per se.

See also *Ziebell v. Lumbermen's Printing Co.*, 14 Wn. (2d) 261, 127 P. (2d) 677.

In view of the foregoing rules, considering the article in Cause No. 1950, the obvious and natural sense of the words and the implications attached thereto would ordinarily and reasonably be understood by an ordinary reader:

(1) That the plaintiff was a party to legal maneuvers preventing the administration of justice.

(2) That plaintiff ridiculously and without reason

or grounds granted a motion for dismissal in order to defeat justice.

Clearly, this language charges the plaintiff with misconduct in office, want of official integrity, and infidelity to a public trust, and brings him in public contempt and calumny.

The language in Cause No. 1951 obviously charges the plaintiff that while he was acting as a judge:

(1) That plaintiff refused to properly administer justice.

(2) That plaintiff took part in legal maneuvers making it impossible for the prosecuting attorney to fairly try his case.

(3) That plaintiff entered into a conspiracy with the defendant in a criminal charge to defeat the administration of justice.

(4) That the plaintiff was situated in a ridiculous situation in connection with the administration of justice.

(5) That the plaintiff acted dishonestly in dismissing a criminal charge.

(6) That plaintiff willfully failed to administer justice.

In spite of this language, at the conclusion of the evidence the trial court directed a verdict in favor of the

defendants, which the plaintiff respectfully submits is contrary to the facts and the law.

II.

QUALIFIED PRIVILEGE AND FAIR COMMENT ARE NOT AVAILABLE AS DEFENSE WHEN ARTICLES ARE LIBELOUS PER SE AND FALSE.

For the foregoing reasons and based on the authorities above cited, these two newspaper articles were each libelous *per se*; and the District Court committed reversible error in refusing to so hold as a matter of law.

Appellees failed to sustain their burden of proof in establishing their affirmative defenses that the articles were true. No substantial evidence was introduced to prove the truth of these articles.

In any event the question as to the truth or falsity of these newspaper articles was clearly a question of fact which should have been submitted to the jury.

The rule of law is well settled in the Federal Courts and by the weight of authority in the State courts that qualified privilege and fair comment as to public officers or others are not available as defenses, when, as in these cases, the newspaper articles are libelous *per se* and false. The decision of the District Court dismissing these actions as a matter of law without submitting the same to the jury is directly in violation of this well settled legal

principle, and is, we submit, unprecedented in the Federal Courts.

This well settled legal principle is stated as follows in the excellent annotation on this question in 110 A.L.R. 412, citing numerous Federal and State court decisions:

“In the majority of jurisdictions the rule that fair comment on and criticism of the acts and conduct of a public officer or candidate for public office are, in the absence of malice, privileged, does not apply to a false statement of fact. In these jurisdictions, *a defamatory statement of fact concerning one in public office, if false, is as actionable as would be such a statement concerning one in private life.*” (All italics are ours).

In *Washington Times Co. v. Bonner*, (C.A.D.C.) 86 F. (2d) 836, 110 A.L.R. 393, the court affirmed judgment for \$45,000.00 against the newspaper for libel, quoted numerous authorities to the same effect, and stated:

“But *the great weight of authority* in the state courts, and *the rule in the Federal courts*, is to the contrary—that *the right of fair comment does not extend to misstatements of fact.* More than a score of the state courts take this view.”

The decision of this Court on this question in *Nevada State Journal Publishing Co. vs. Henderson*, (CCA 9) 294 Fed. 60, certiorari denied, 264 U. S. 591, 44 S. Ct. 404, 68 L. Ed. 865, left no doubt on the subject. This Court there so held, and affirmed judgment for damages against the newspaper for libel. Judge Rudkin, speaking for this Court, Judges Gilbert and Hunt concurring, said:

"We will now return to the question of privilege. Upon that question the court instructed the jury as follows:

"The mere fact that a man is a public officer, or is a candidate for public office, does not constitute a warrant either to the ordinary citizen or to a newspaper, to spread false charges against him of criminal acts or disgraceful conduct. In a sense, in becoming a candidate, a man invites close scrutiny and opens his life to the light of publicity. Within the range of good faith a newspaper may properly disclose to the public and advise the electorate of the state of his every act and utterance, and criticize and comment thereon, even with severity, and suggest any reasonable inference or implication therefrom bearing upon the fitness or qualification faithfully or efficiently to discharge his duties as a public officer, or his qualifications for the office which he seeks. But the distinction must be drawn between comment and criticism, and untrue charges of facts constituting a crime or disgraceful conduct. It is one thing to pass severe criticism upon, or to draw even extreme inferences from, acknowledged facts, or to indulge in intemperate denunciation, even though bitter, and quite another thing to assert the existence of particular acts of criminality or of shameful misconduct upon the candidate's part. *Neither the newspaper nor the citizen may with impunity falsely charge the candidate or the public officer with specific acts of criminality or shameful conduct.*"

"*This instruction is in harmony with the great weight of authority.* (Citing numerous cases) . . .

"There is no error in the record, and the judgment of the court below is affirmed."

In the leading case of *Post Publishing Co. v. Hallam*, (CCA 6) 59 Fed. 530, cited with approval in the Hender-

son case and quoted with approval in the Bonner case, (later) Chief Justice Taft speaking for the court, said:

“But, if the privilege is to extend to cases like that at bar, then a man who offers himself as a candidate must submit himself uncomplainingly to the loss of his reputation, not with a single person or a small class of persons, but with every member of the public, whenever an untrue charge of disgraceful conduct is made against him, if only his accuser honestly believes the charge upon reasonable ground. We think that not only is such a sacrifice not required of every one who consents to become a candidate for office, but that to sanction such a doctrine would do the public more harm than good. . . . But the danger that honorable and worthy men may be driven from politics and public service by allowing too great latitude in attacks upon their characters outweighs any benefit that might occasionally accrue to the public from charges of corruption that are true in fact, but are incapable of legal proof. The freedom of the press is not in danger from the enforcement of the rule we uphold.”

In *Post Publishing Co. v. Moloney*, 50 Ohio St. 71, 33 N. E. 921, cited with approval by this court in the Henderson case, the court affirmed judgment for plaintiff and said:

“The real ground on which the alleged privilege is claimed in argument is that, inasmuch as the investigation of the conduct of the police commissioners was a matter of public concern in the City of Cincinnati, and the character of their appointees on the police force was incidentally involved, the defendant, so long as it was not actuated by malice, had the right to publish as an item of news, and in the public interest, any criticism, comment, or statement con-

cerning the personal character and standing of the plaintiff, as well as his official action and conduct as a policeman. . . . We do not think the doctrine either sound or wholesome. In our opinion, a person who enters upon a public office, or becomes a candidate for one, no more surrenders to the public his private character than he does his private property. Remedy by due course of law, for injury to each, is secured by the same constitutional guaranty, and the one is no less inviolate than the other. To hold otherwise would in our judgment, drive reputable men from public positions, and fill their places with others having no regard for their reputations; and thus defeat the purpose of the rule contended for, and overturn the reason upon which it is sought to sustain it. That rule has not been generally adopted in this country, (citing cases) and the converse of it has hitherto obtained in this state."

In *Eikhoff v. Gilbert*, 124 Mich. 353, 83 N. W. 110, 51 L.R.A. 451, approved in the Henderson case, the court reversed judgment of dismissal in a libel action and said, citing numerous authorities:

"We are of the opinion that the court erred in saying that the words were privileged. Not being privileged, it should have been left to the jury to say whether the evidence showed that plaintiff's support of these measures was opposed to the moral interests of the community as a matter of fact; in other words, to determine the truth of the charge.

"It is hardly necessary to cite authorities in support of the doctrine that a candidate for office has a right of action for aspersions upon his character, and cannot to be subjected to unwarranted and untruthful charges."

In the leading case of *Burt v. Advertiser Newspaper*

Co., 154 Mass. 238, 28 N. E. 1, 13 L.R.A. 97, in affirming judgment against the newspaper, Justice Holmes, speaking for the court, said:

“Moreover the statements about such matters which come before the courts are generally public statements, where the harm done by a falsehood is much greater than in the other case. If one private citizen wrote to another that a high official had taken a bribe, no one would think good faith a sufficient answer to an action. He stands no better certainly, when he publishes his writing to the world through a newspaper, and the newspaper itself stands no better than the writer.”

In the recent case of *Caldwell vs. Crowell-Collier Publishing Co.*, (CCA 5) 161 F. (2d) 333, 336, Judge Sibley, speaking for the court, said:

“More broadly it is argued that since the publication related to a public officer and was by the public press, there is a qualified privilege which excuses it. Free speech and free press are an established part of our democratic institutions, but both are limited by the law of slander and libel. By word and by pen the official record and pronouncements of a public man may be discussed and criticized, condemned and even vituperated, *but the facts cannot be perverted with impunity.*”

See also to the same effect:

Carey v. Hearst Publications, Inc., 19 Wn. (2d) 655, 143 P. (2d) 857;

Graham v. Star Publishing Co., 133 Wash. 387, 233 Pac. 625.

The district court therefore clearly erred in flagrantly

disregarding these well settled legal principles, in refusing to submit the cases to the jury, and in granting the motion for a directed verdict.

III.

THE COURT ERRED IN HIS RULING THAT THE DEFENDANTS ARE NOT SUBJECT TO LIABILITY IN ANY EVENT IF THE ARTICLES WERE LIBELOUS FOR THE REASON THAT THE PUBLICATIONS WERE AN ACCURATE REPORT OF A PUBLIC GATHERING OF LAYMEN.

The Court throughout the record and in his memorandum granting the defendants' motion for directed verdict held and concluded that the defendant corporations publicized and circulated the libelous articles as an honest and fair report of the proceedings of a public gathering of laymen and that there could not be any liability on the part of the defendants if the articles were libelous because the defendants had a privilege to print such matter (R. 288). The trial Court is not sustained by any legal authority, as demonstrated by the following cases.

A person who repeats or otherwise publishes defamatory matter is liable to the same extent as though he had originally published it, and a newspaper editor cannot escape liability for a defamatory publication by naming the author and stating where the libel was first published.

In the case of *Times Pub. Co. v. Carlisle*, 94 Fed. 762,

the Eighth Circuit Court of Appeals through Judge Sanborn said:

“ ‘A good name is rather to be chosen than great riches, and loving favor rather than silver and gold.’ The respect and esteem of his fellows are among the highest rewards of a well-spent life vouchsafed to man in this existence. The hope of them is the inspiration of his youth, and their possession the solace of his later years. * * * it is no justification for the publication of such a libel that another had spoken or written the false charge, and that the libeler simply repeated his statement, and that he gave the name of his informant. It is no defense to an action of trespass that another trespassed, and informed the defendant how to do it without expense or trouble; and it is no excuse or justification for an injury to a fair reputation that another has commenced to besmirch it, and has furnished the pigments to carry on the nefarious undertaking.”

The same holding is reiterated in *Lubore v. Pittsburg Courier Publishing Company*, 101 Fed. Supp. 234 (D. C. 1951). See also 3 Restatement of Torts, Sec. 578; Prosser on Torts, page 812.

A reprint by a publisher of a newspaper dispatch is no defense. *Carey vs. Hearst Publications, Inc.*, 19 Wn. (2d) 655, 143 P. (2d) 857; which case has adopted the following language:

“The prevailing rule in this country was epitomized by Mr. Justice Holmes in *Peck v. Tribune Co.*, 214 U. S. 185, 189, 53 L. Ed. 960, 29 S. Ct. 554, 16 Ann. Cas. 1075: ‘If the publication was libelous the defendant took the risk. As was said of such matters by Lord

Mansfield, ‘“Whatever a man publishes, he publishes at his peril.”’”

See also *Miles v. Louis Wasmer, Inc.*, 172 Wash. 466, 20 P. (2d) 847.

The repetition of slanderous words gives rise to a separate and independent cause of action. *McKay v. Foster*, 166 N. Y. S. 331, 179 App. Div. 303.

IV.

THE COURT ERRED IN SUSTAINING AN OBJECTION TO EVIDENCE OFFERED BY THE PLAINTIFF OF PRIOR AND SUBSEQUENT PUBLICATIONS WHICH WOULD PROVE:

(1) Knowledge of falsity on the part of the defendants of the article of May 13, 1953.

(2) Malice on the part of the defendants, which would deprive the defendants of the defense of qualified or conditional privilege if it were available to them.

(3) Punitive damages. (Ex. 2, 3, 4, 5 refused; R. 35-40, 44).

The evidence discloses that Fred Cassin, reporter for the *Idahonian*, knew that the Estes hearing would be had at the courthouse and attended it and reported the procedure.

Mr. Boas, the editor, was apprised of the fact that Mr. Estes had volunteered to have the court set aside the

order of dismissal and proceed with the hearing (R. 32, 33, 268).

Editors of both papers were fully cognizant of the matters and things happening at Moscow and had on several occasions published and referred to the January 15 proceeding. Through their investigation they necessarily must have arrived at some conclusions as to the truth or falsity of the matter. If they had reason to believe that the articles were untrue or false or that they were negligent in ascertaining the truth, then the defense of qualified privilege is not available to the defendants. *Gott v. Pulsifer*, 122 Mass. 225; *Toothaker v. Conant*, 91 Me. 438; *McKillip v. Grays Harbor Pub. Co.*, 100 Wash. 657, 171 Pac. 1026.

The municipality of publications, in addition to proving malice, has a bearing upon damages. *Mannix v. Portland Telegram*, 23 P. (2d) 138, 90 A.L.R. 55; 58 C.J.S. 522, Sec. 214.

The existence of malice may be inferred from the article itself. Actual malice may be inferred from falsity, absence of proper cause, or other relative circumstances, or from communications, of which it forms a part. All circumstances surrounding a transaction are proper for consideration, including a failure to make a proper investigation. *Cook v. East Shore Newspapers*, *supra*. See also 33 Am. Jur. 113, 114, Sec. 111.

Malice is a matter for the jury to determine from all the facts and circumstances and not a matter for the court to determine, unless the minds of reasonable men cannot differ on the subject, which plaintiff contends is not the situation in the case at bar.

V.

THE COURT ERRED IN SUSTAINING AN OBJECTION TO PLAINTIFF'S OFFER OF EVIDENCE SHOWING THE IMPACT OF THE ARTICLE ON THE PLAINTIFF AND ALL PERSONS WHO READ THE ARTICLE.

From the testimony given and stricken by the court and the offer of proof, it appears that the plaintiff sustained mental and physical injury and that the article created an impression upon the readers that plaintiff was corrupt and dishonest in performing his duties as judge (R. 57-59, 69-75).

The interpretation of a defamatory matter is not upon the defendant's understanding of the meaning of the words or his intention as to whom they apply if the recipient reasonably under the circumstances gave the words a different meaning or understanding. (Belli, *Modern Trials*, pg. 502, Sec. 11).

The fact that the readers were impressed and were imbued with the idea that the plaintiff received money for the dismissal of the charge against Mr. Estes clearly proves the viciousness of the articles.

The trial court withheld all such evidence tending to show the damage to the plaintiff and which testimony without any ambiguity is admissible under the decisions. *Maddox v. News Syndicate Co., Inc.*, 176 Fed. Sup. 897, 12 A.L.R. (2d) 988. The annotation following this case and the majority rule discloses that California, Massachusetts and Michigan hold that such testimony is admissible. In addition to the foregoing authority, Washington in *Luna v. Seattle Times Co.*, 186 Wash. 618, 59 P. (2d) 753, 105 A.L.R. 932, followed by an annotation at pg. 944, adds authority to the admissibility of evidence proving the effect of the article upon its readers.

The majority of cases hold that when an article is published concerning a public official which is libelous per se, the defendant must prove the truth; otherwise, there is no defense of qualified privilege. *Cook v. East Shore Newspapers*, supra; *Wash. Times Co. v. Bonner*, supra; *Hollenbeck v. P. I. Co.*, 162 Wash. 14, 207 P. 793; *Miles v. Wasmer*, supra.

VI.

THE COURT ERRED IN SUSTAINING AN OBJECTION TO PLAINTIFF'S EVIDENCE TO SHOW THE PROCEDURE IN A PRELIMINARY HEARING WHEN THE PROSECUTING ATTORNEY AND COMPLAINING WITNESS FAIL TO APPEAR.

The matter of technical procedure can be proven by expert testimony. *Lynch v. Republic Publishing Co.*,

supra. The testimony rejected by the court was offered by the plaintiff, who had acted as judge for the justice court since 1944 and who certainly would be qualified to testify as to what the normal procedure was. In additon, Mr. Lawrence Huff, the oldest member and considered the dean of the Moscow Bar, offered to testify as to the procedure, all of which was rejected by the trial court (R. 74, 75, 114, 115).

It is certainly important for the jury to understand that under the circumstances such as occurred on January 15, 1953 when the Prosecuting Attorney and the complaining witness failed to appear, that it was a proper and customary procedure and nothing underhanded and corrupt or dishonest for the court to enter an order of dismissal for the lack of proof.

Under the state of the record, and without expert testimony, the jury in all probability would have been impressed with the proposition that the judge acted unfairly and with bias and prejudice against the prosecution and in favor of the defendants.

VII.

THE COURT ERRED IN SUSTAINING AN OBJECTION TO THE EVIDENCE OFFERED BY WINN BLAKE, PROSECUTING ATTORNEY OF NEZ PERCE COUNTY.

The defense in this case was attempting by direct evidence or by innuendo to show and to prove that the

plaintiff entered an order of dismissal on January 15, 1953 by misleading the Prosecuting Attorney and holding the hearing at the county courthouse. The evidence disclosed that the Prosecuting Attorney had full knowledge that the hearing was to be held at the courthouse on the 13th of January, 1953; that he had discussed the matter with Mr. Clements, opposing counsel, and Mr. O'Donnell, and Mr. Wynne Blake on January 14, 1953, and in addition to this, together with Mr. Huff, prepared an order of dismissal which he had filed with the probate judge.

Mr. Alsager's testimony was to the effect that he had a recollection that he had talked to Mr. Wynne Blake over the telephone on the 14th of January, 1953, but had no recollection of what he or Mr. Blake had said. Under these circumstances, it is not a matter of impeaching Mr. Alsager, but it is a matter of showing affirmatively that he had made the statement to Mr. Blake that he would dismiss the charge, and consequently accounting for his absence from the hearing. In addition to this, he had also told the plaintiff that he would not appear at the hearing. Under these circumstances, it was obvious error to deny the admission of Mr. Blake's testimony (R. 280-282).

VIII.

THE COURT'S UNPROVOKED REMARKS NOT PERTAINING TO THE EVIDENCE OR THE ISSUES IN THE CASE ARE HIGHLY PREJUDICIAL AND THE TRIAL COURT SHOULD BE INSTRUCTED TO REFRAIN FROM SUCH CONDUCT OR PREFERABLY INVITE ANOTHER TRIAL JUDGE IN THE EVENT THIS MATTER IS SENT BACK FOR RETRIAL.

Plaintiff concedes that the trial court may comment upon the evidence and issues to the jury, but the plaintiff contends that the remarks of the trial court should be confined only to the evidence and issues.

The record is replete with the trial court's remarks on matters and things not in connection with the trial of the cause and not in accordance with the dignity of the court.

This inanimate record cannot by any stretch of the imagination reflect the sneering remarks directed to plaintiff's counsel nor the knowing look and smile directed to the jury pursuant to his remarks. A cursory examination of the record discloses that the trial court was so unsympathetic with the plaintiff's cause that he refused to listen to authorities cited him and his attitude and demeanor thoroughly embarrassed plaintiff's counsel and influenced the jury to such an extent that had the court allowed the jury to pass upon the issues, they would probably by reason of the court's demeanor and attitude have resolved and

returned a verdict in favor of the defendants. In the name of justice this court, in the event it reverses the trial court's order, should instruct him to refrain from the procedure adopted by the trial court, or preferably invite another trial judge to sit in the trial of this case.

For the foregoing reasons and based upon the foregoing authorities, we therefore respectfully submit that the district court erred in granting the motion for directed verdict and in the other respects hereinabove mentioned, and the judgment of dismissal should be reversed and these actions remanded for a new trial by jury.

Respectfully submitted,

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and
MURRAY ESTES
Attorneys for Appellant

Nos. 14469 - 14470

In The

United States Court of Appeals

For the Ninth Circuit

JOHN K. BORG,

Appellant,

vs.

LOUIS A. BOAS and THE NEWS-
REVIEW PUBLISHING COMPANY,
INC., a Corporation,

Appellees,

and

JOHN K. BORG,

Appellant,

vs.

THE TRIBUNE PUBLISHING COM-
PANY, a Corporation,

Appellee.

No.
14469

No.
14470

*Appeal from the United States District Court
for the District of Idaho
Central Division*

HONORABLE CHASE A. CLARK
United States District Judge

BRIEF OF APPELLEES

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FILED

FEB - 2 1955

PAUL P. O'BRIEN,
CLERK

Nos. 14469 - 14470

**In The
United States Court of Appeals
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JOHN K. BORG,	<i>Appellant,</i>	}	No. 14469
vs.			
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Nos. 14469 - 14470

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BRIEF OF APPELLEES

STATEMENT OF THE CASES

Under rule 18 subdivision 3, appellant's statement of the case is controverted and will hereinafter be specifically commented upon. Appellees' statement is as follows:

ISSUES

Each of the two cases was instituted by appellant, one against the appellee newspaper, Tribune Publishing Company, and T. C. Thomas, and the other against the appellee newspaper, The News-Review Publishing Company, its editor, Louis A. Boas, and T. C. Thomas, to recover damages

for publishing, on May 13, 1953, articles (plaintiff's Exhibits 1 and 6) reporting a speech made by T. C. Thomas on May 12, 1953 at a public meeting in Moscow, Idaho.

Appellees defended on the grounds that the words spoken and published were just and fair reports of a matter of public interest and concern and that said words were spoken and published for the public benefit and were, therefore, privileged, and that said articles were true in substance and in fact.*

The cases were consolidated for trial.

Prior to the trial, T. C. Thomas was, on his motion, dismissed from the action herein numbered 14470 (R. 27). At the conclusion of appellant's evidence, T. C. Thomas was, upon his motion, dismissed from the action herein numbered 14469 (R. 150).

No appeal was taken from said dismissals and T. C. Thomas is not a party to these appeals.

At the conclusion of appellant's (plaintiff's) evidence, the appellees (defendants), other than Thomas, renewed motions to dismiss, made before trial, which had then been denied without prejudice to renewal at trial. (R. 149). The same were overruled again, without prejudice (R. 151). After all the evidence had been submitted, the appellees again renewed their motions to dismiss and, in addition, moved for a directed verdict in favor of the appellees (R. 286).

The jury was instructed to (R. 292) and did return a verdict in favor of appellees (R. 17 and 19) and judgments were

*The complete articles are set forth in the appendix and appear in the printed record in Case No. 14469 at pages 15 and 16 and in Case No. 14470 at pages 17 and 18.

entered accordingly, (R. 17 and 19) from which these appeals are taken.

FACTS

On and prior to December 14, 1952, the above mentioned defendant, T. C. Thomas, was a Captain in the United States Navy and Commanding Officer of the Naval Reserve Officers Training Corps at Moscow, Idaho. One Richard Shoup was enrolled as a midshipman member.

On the aforesaid date, Shoup became involved in an altercation and combat with one Murray Estes, a lawyer in Moscow, Idaho, and former prosecuting attorney of Latah County, Idaho. The altercation took place in a public business establishment operated by E. G. Greene. Estes struck Shoup in the face with his fist, jabbed a gun into the ribs of E. G. Greene, and threatened to shoot and kill Shoup (Exhibit 23, pages 3, 4, 5, 15, 16, 17, 18, and 30). No arrest was made at the time. Estes' accosting Shoup was a case of mistaken identity. (Exhibit 23).

On January 12, 1953, and within thirty minutes of the time the incoming Prosecuting Attorney and Probate Judge of Latah County, Idaho, were sworn in for their first terms of office (R. 64, 80), Estes was charged in the Probate Court of said Latah County with the crime of: "Assault with a Deadly Weapon — a Felony" upon Richard Shoup (Exhibits 7, 13, 14, and 22) (R. 50, 51). No warrant of arrest was issued (R. 63) and he was released on his recognizance (R. 50). On the same afternoon, Attorney Lawrence Huff, friend and attorney for Estes, called upon the Prosecuting Attorney, suggested a dismissal (R. 155) and continued to press for

same with meetings and preparation of formal motions (R. 155, 156, 157, 158, 161, and 193).

On January 14, 1953, the Probate Judge disqualified himself and the case was transferred to the Justice Court of appellant, John K. Borg. Late that afternoon, appellant and prosecuting attorney, Alsager, had a conference at the Elks Club (R. 52, 79, 88 and 89) in reference to the attendance of the prosecutor at the preliminary hearing which the Probate Judge had set for January 15, 1953 (R. 52, 163). The place for holding the preliminary hearing was not mentioned (Defendants' Exhibit 8) (R. 87 and 103). The prosecutor assumed the hearing would be held in the Police Station (R. 79 and 152) and arranged for the attendance of witnesses and a court reporter accordingly. He called appellant at eight o'clock on the morning of the 15th and told him he would be at the hearing at nine o'clock (R. 86, 89 and 165).

The telephone call by the prosecutor at eight o'clock on the morning of the 15th was not denied but admitted by appellant (R. 86, 89). Appellant had previously advised the prosecutor (on the afternoon of January 14, 1953) that so far as he was concerned, it would not be necessary for him (the prosecutor) to attend and that he (appellant) couldn't see why he should call him (R. 53) and that, "so far as I know, you don't have to be there, I don't know of any reason why I should tell you to be there" (R. 88). After advising the prosecutor not to attend, the appellant made no effort prior to the scheduled time for hearing to arrange for the attendance of the complaining witness or any other witness, the sheriff, former prosecuting attorney, or any person that

might know anything about the charge pending before him. He did not advise the complaining witness, or any other witness, that the case had been transferred into his Court or that he would hold a hearing of the charge in the Courtroom of the District Court of Latah County, instead of the Courtroom of the Probate Court or in the City Hall.

The prosecutor, the complaining witness, nine witnesses, and a Court Reporter were at the Police Station in the City Hall for the preliminary hearing at nine o'clock on the morning of the 15th (R. 165, 166, 167). At the same time, and unbeknown to the prosecutor, the appellant Justice of the Peace; Defendant Estes; Estes' attorney; Fred Cassin, a newspaper reporter; and others were at the District Courtroom in the Latah County Courthouse (R. 225).

Shortly after nine o'clock, the prosecutor, through the Police Matron, Peggy David, and the Latah County Sheriff's Office endeavored to and finally did contact the appellant (R. 218, 219, 221, and 222) and advised him that Mr. Alsager and his witnesses were at the Police Station waiting for him.

At seven minutes past nine o'clock, the appellant dismissed the criminal charges against Estes on motion of defendant's attorney because no evidence had been produced (Plaintiff's exhibit 7, defendants' exhibits 13, 14 and 22) (R. 50, 51, 56 and 227).

Prior thereto, appellant had made no attempt to contact the sheriff, prosecutor, or any other officer in regard to the matter (R. 86), although there were several telephones available had he been inclined to use them.

Immediately after the dismissal, appellant went to the Police Station, met the Prosecutor, advised him of the dismissal, but did not suggest any remedy therefor (R. 97, 98 and 100). The dismissal immediately aroused public criticism of which the appellant was conscious (R. 100, 101) and which continued to the date of the alleged defamatory publications (R. 104) to the extent that he addressed a letter to a Spokane, Washington, newspaper defending his action (Exhibit 8) (R. 102 and 103) in which he said:

"This is the fact: In the first place, from what I know about Mr. Estes, I do not think he is the kind of man that took a gun around town without a reason and furthermore, I do not think there is a man, woman, or child in the town of Moscow who is afraid of going about their business or pleasures for fear of being molested by Mr. Estes. * * * *

"Just why the Prosecuting Attorney, Mr. Alsager, and myself did not get together on the place of our holding the hearing, I do not know. Neglect on the part of both of us perhaps."

On January 17, 1953, Estes was charged by the prosecutor with the same crime of: "Assault with a Deadly Weapon" upon E. G. Greene in a Justice Court before Kent Power, Justice of the Peace. Judge Power was immediately disqualified by Estes and the case was transferred to appellant's court (Defendants' exhibits 15, 16 and 17) (R. 169, 170) who presided at the preliminary hearing held January 21, 1953 (Defendants' exhibit 23). The defendant, Estes, was represented by Lawrence H. Huff, (R. 172, 279 and 280) who had previously been instrumental in attempting to induce the prosecuting attorney to dismiss the first case against Estes.

Appellant dismissed the second charge against Estes (Defendants' exhibit 23, page 66) for insufficiency of the evidence (Defendants' exhibit 23, pages 3, 4, 5, 15, 16, 17, 18 and 30) (R. 172); (Defendants' exhibits 15, 16 and 17).

Matters abated officially until April 8, 1953, when Estes was charged with the crime of: "Battery" upon Richard Shoup, before Kent Power, Justice of the Peace (Defendants' exhibits 18, 19 and 20) (R. 173). Estes immediately disqualified Power and the case was transferred back to the Probate Court before the same Judge who had previously disqualified himself in the first case against Estes. (R. 50, 51). A plea of double jeopardy was made and denied and a Writ of Prohibition was applied for in the Supreme Court of Idaho (R. 175) after which Estes entered a plea of guilty and was fined \$100.00 by the Probate Judge. The plea of guilty was accepted in private by the Probate Judge who did not call the prosecutor until after the case had been disposed of even though the case had been set for trial the next day. (R. 175, 176).

Two or three days after the filing of the battery charge, Estes charged Shoup in the Justice Court of Kent Power, with the crime of: "Attempt to Compound a Crime — a Felony" (Defendants' exhibit 21) (R. 173 and 239). This case was pending at the time the battery case was disposed of by plea. The case against Shoup was dismissed by the Prosecuting Attorney at the time it was set for trial at the County Courthouse. (R. 177). A number of people were attendant for the hearing in the Shoup case (R. 177) and, after its dismissal,

a meeting was held by them in the courthouse wherein the calling of a Grand Jury in connection with the Estes-Shoup affair was discussed (R. 178). Petitions for the calling of a Grand Jury were later filed with public officials (R. 179).

Beginning the latter part of January, 1953, Captain Thomas became concerned with the Estes-Shoup cases because Shoup was flunking out of school (R. 181). Thereafter he and Prosecutor Alsager conferred frequently about the course of events and the effect of them upon the midshipman student, Shoup (R. 179 and 180).

By May 12, 1953, public discussion and feeling were such that a public meeting was held in the High School in Moscow, Idaho, which was attended by 150 or 200 citizens of Moscow and the immediate vicinity (R. 244, 245, 253.) Dean Jeffers, a professor at the University of Idaho, presided at the meeting (R. 244, 254). The purpose of the meeting was to form a good government league (R. 254) and some persons were named to offices (R. 254). A number of people addressed the meeting (R. 255). About midway, Captain Thomas addressed the meeting. Al Barrackman and Ladd Hamilton, reporters for the defendant newspapers, were present (R. 244 and 252). Each heard the address of Captain Thomas, who spoke from notes and did not read from a written manuscript (R. 246, 250, 259 and 260). Each reporter admitted writing the respective articles (Plaintiff's exhibits 1 and 6). Each admitted they wrote the quotations appearing therein in the exact words as they heard Captain Thomas speak them (R. 246-250; 255-260). There was nothing in the articles other than the proceedings that transpired in the meeting (R. 248).

In action herein numbered 14469, the complaint alleges "that said article was false and untrue, particularly in the following respects":

"Thomas then made reference to legal maneuvers in which a hearing was set for January 15 at 9 a. m. At 8 a. m. that day, Thomas explained, Alsager notified Judge John K. Borg that he would be ready at 9. Alsager and his witnesses were present at police court, normally the place where such hearings are held. But the Judge and Estes, Thomas said, had gone to the county courthouse to hear the case.

" 'This was a ridiculous situation,' said Captain Thomas. A motion for dismissal was made and it was dismissed. 'If this had been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witnesses and come on over.'

* * *

"But these things, Thomas said, 'continued to disturb me':

* * *

"3. The extraordinary circumstances in which the first felony was dismissed.

"4. Circumstances of the dismissal of the second charge against Estes.

* * *

"There is no way to get justice or to correct the faults in the administration of justice * * * without a grand jury,' Thomas concluded." (R. 5-6)

In action herein numbered 14470, the complaint alleged "that the article was false and untrue, particularly in the following respects":

"The meeting opened with a long and detailed review of the Estes-Shoup case by Capt. Thomas C. Thomas, commander of the University Naval ROTC unit, of which Shoup was a member.

"Captain Thomas declared that 'I don't like the smell of it. I don't think we have here in this county now the proper administration of justice.'

* * *

"Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol.

* * *

"Legal maneuvers had made it impossible for the prosecuting attorney to get a trial on that charge.

* * *

"At 9 a. m., he added the prosecuting attorney and witnesses and the court reporter appeared at the police court, normally the place where the hearing would be held. But the judge and Estes had gone in the meantime to the district courtroom to hear the case.

"This was a ridiculous situation,' Thomas said.

"Counsel for Estes moved that the case be dismissed and it was. If this had been an honest mistake, it could have been easily rectified simply by lifting a telephone and telling the prosecuting attorney to bring his witnesses and come on over.'

* * *

"But Thomas said these things disturbed him:

* * *

"The extraordinary circumstance of dismissing the first battery charge while the prosecutor was in the regular courtroom and the judge and defendant were in another;

"Circumstances of the dismissal of the second charge against Estes;

* * *

“ ‘What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we’d go through the same rigamarole. There is no way to get justice or to correct the faults in the administration of justice in Latah County without a grand jury.’ ” (R. 5-6)

APPELLEES’ COMMENT ON APPELLANT’S STATEMENT OF THE CASE

Appellees believe there are numerous statements contained in appellant’s statement of the case that are not borne out by the record, however, many of these pertain to issues which they feel are not material to a determination of the case by this court. The following, however, appellees feel should be called to the attention of the court:

1. On page 8 of appellant’s brief endeavor is made to infer that Mr. Lawrence Huff, later Mr. Estes’ attorney, was consulted by Alsager, the prosecuting attorney, which discussion resulted in Alsager concluding, that he would make a motion for the dismissal of the complaint and absenting himself from the hearing. Mr. Huff testified:

“A. I was the senior member of the bar at Moscow from a point of experience and age and Mr. Alsager, prior to that time, had consulted me frequently and asked my advice in regard to other matters in the law business. *At this time I interested myself in the matter because of the effect of this charge on the public and on the members of the bar and I went voluntarily to Mr. Alsager’s office.*” (R. 276) (Emphasis ours)

He further testified that the motion for dismissal was typed in his office (R. 277) and accompanied Alsager to the probate judge’s office to see that it was filed (R. 278). Huff also

prepared a second motion for dismissal after the probate judge had disqualified himself, changing the title of the court in which the action was pending to the justice court (R. 279). The only testimony concerning Alsager's intentions to appear in the action appears on page 279 of the record as follows:

"Q. Did you have any conversation with him at the time that you presented the second motion for dismissal as to whether or not he was going to appear?

"A. At that time he informed me that he wasn't going to make a motion for dismissal but he didn't intend to make any appearance in the action." (R 279)

Mr. Alsager's version of Mr. Huff's activities are as follows:

"Q. Did Mr. Huff request you to sign this motion for dismissal?

"A. Not only that, he persuaded me to sign it." (R. 193).

The remaining detailed facts concerning Mr. Huff's activities to secure a dismissal of the charge will be found on the pages of the record to-wit: (R. 154, 155, 156, 157, 158, 161).

2. On page 9 the statement is again made that "Mr. Alsager had changed his mind about attending the hearing * * *." Page 167 of the record is quoted to support this statement. No such evidence appears.

3. On page 9 the statement is made that the motion for dismissal of the first Estes complaint was granted "at about 9:25." Pages 54, 93, 94, 106 and 282-285 are cited in support of this statement. On none of the pages cited is the time of dismissal fixed at 9:25 or "about 9:25." The fixing of the

time of dismissal by witnesses for appellant appears on pages 168, 218-220 and 226, 227, of the record. Witness Cassin fixed the time at 9:07 (R. 226, 227). His testimony is corroborated by the testimony of witnesses David (R. 218-220) and Alsager (R. 168).

4. On page 9 the statement is made in connection with the meeting of May 12, 1953, that "T. C. Thomas was the chairman * * *." No reference to the record is made to support this statement. The evidence concerning the presiding officer at the meeting appears on pages 244 and 254 of the record.

5. Appellees believe the statement of facts contained in appellant's brief is wholly inadequate to present to the court a full, true and correct statement of the material facts the trial court had before it in deciding the case. The only statement contained in Appellant's Statement of the Case with reference to the manner in which the second and third criminal charges filed against Estes were maneuvered through the Courts and their ultimate disposition is contained in a single sentence on page 9 of the brief, reading: "Thereafter, other charges were filed against Mr. Estes, * * *." No reference is made to the felony charge made by Estes against Shoup. Appellant fails to detail the record of these other charges as if they had no bearing on the action of the Court in directing a verdict for the defendants.

In lieu of a factual statement, appellant has devoted one-half of his statement of the case (pages 12 to 22, inclusive) to statements made by the trial court that have no bearing on whether granting the motion for directed verdict in favor of the defendants was or was not proper.

ARGUMENT

Appellant's argument presents three general issues as follows:

1. The Court erred in holding the printed articles not libelous per se.

2. The defenses of qualified privilege and fair comment are not available if any statements of fact in the alleged libelous publications are false.

3. The Court erred in several respects in the admission or rejection of evidence.

Appellees will answer these issues as follows:

1. The defenses of qualified privilege and fair comment are available in this jurisdiction even though false statements of fact are contained in the alleged libelous publication.

2. The publications were privileged.

3. The alleged libelous matter was a fair comment on a matter of public concern, was published without malice, and appellees are not liable for its publication.

4. The alleged libelous matter was true.

5. If granting appellees' motion for directed verdict was correct, errors in the admission or rejection of evidence become immaterial and are not grounds for reversal.

THE DEFENSES OF PRIVILEGE AND FAIR COMMENT ARE AVAILABLE IN THIS JURISDICTION

I.

In urging that the defenses of privilege and fair comment are not available to the appellees in the instant action, appel-

lant assumes that the facts set forth in the alleged libelous articles are false. Nowhere has he pointed out what facts are false or upon what basis he claims them to be false. The question of truth or falsity of the facts stated in the alleged libelous articles will be discussed in another section of this brief. Appellees believe the rule to be that the defenses of privilege and fair comment are available in the jurisdiction from which this case arose, irrespective of whether there are false statements of facts contained in the alleged libelous article.

On page thirty-three of his brief, appellant says:

“The rule of law is well settled in the Federal Courts and by the weight of authority in the State Courts that qualified privilege and fair comment as to public officers or others are not available as defenses, when, as in these cases, the newspaper articles are libelous per se and false.”

Cited in support of the foregoing statement is *Washington Times Co. vs. Bonner*, (D. C.), 86 F. (2d) 836, 110 A.L.R. 393 and note 412, and other cases making similar holdings. There is no doubt that many courts, both State and Federal, have so held. On the other hand, many courts, both state and federal, and particularly the more recent decisions, take the view that the defenses are available, even if false statements of fact are made in the publication, if the false statements were honestly made in the belief that they were true, without actual malice and upon reasonable grounds for belief in the truth

thereof.* In *Washington Times Co. v. Bonner*, supra, the opinion refers to the doctrine there followed as being "the rule in the Federal Courts."† That case was decided in 1936. In 1938 the Supreme Court of the United States in *Erie R. Co. v. Tompkins*, 304 U. S. 64, held that the rule of law in the state in which the cause of action arose was controlling upon the federal courts in tort matters. It, therefore, follows that the trial court and this court are bound by the rule of law announced by the Supreme Court of Idaho. The rule in Idaho was established in *Gough v. Tribune-Journal Co.*, 275 Pac. (2d) 663. The case involved publication of an open letter signed by certain taxpayers in Bannock County, Idaho, published in the local newspaper, criticizing certain actions of the Board of County Commissioners in connection with preparation of the county budget. In a unanimous opinion, the Supreme Court of Idaho quoted with approval, 3 A.L.I., Restatement of the Law of Torts, page 240 as follows:

"Occasions conditionally privileged afford a protec-

*The leading case adhering to the so-called minority rule is *Coleman v. MacLennan* (Kan.), 98 Pac. 281. Other decisions following the rule in the MacLennan case are:

Snively v. Record Pub. Co., (Cal.), 198 Pac. 1

Sylvester v. Armstrong, (Wyo.) 84 Pac. (2d) 729

Williams v. Standard-Examiner Pub. Co., (Utah), 27 Pac. (2d) 1

Griffin v. Opinion Pub. Co., (Mont.), 138 Pac. (2d) 580

Emde v. San Joaquin etc. Council, (Cal.), 143 Pac. (2d) 20, 150 A.L.R. 916

Reynolds v. Arentz, (D.C. Nev.), 119 F. Supp. 82

Broking v. Phoenix Newspapers, Inc., 264 Pac. (2d) 413

Bailey v. Charleston Mail Assn., (W. Va.) 27 S.E. (2d) 837, 150 A.L.R. 348

Chesapeake Ferry Co. v. Hudgins, (Va.), 156 S.E. 429

†The rule stated in *Washington Times v. Bonner*, may now well be questioned as the rule in the courts of the District of Columbia in view of the more recent decisions in *Sullivan v. Meyer*, 141 Fed. (2d) 21, *Potts v. Dies*, 132 Fed. (2d) 734, and *Sweeney v. Patterson*, 128 Fed. (2d) 457. The remarks of the court refusing to follow in toto the rule in *Washington Times v. Bonner* are set forth in Appendix C.

tion based upon a public policy which recognizes that it is essential that true information shall be given whenever it is reasonably necessary for the protection of one's own interests, the interests of third persons, or certain interests of the public. In order that such information may be freely given, *it is necessary to afford protection against liability for misinformation given in an honest and reasonable effort to protect or advance the interest in question.*" (Emphasis ours.)

The decision in the Gough case is in accord with the authorities from all of the far western states and this Court, with the only exceptions being the States of Washington and Oregon.

The opinion in the Gough case also holds the defense of fair comment is proper, and that is the rule in this Court. In *Golden North Airways, Inc., vs. Tanana Publishing Company, Inc.*, 9th Circuit Case No. 13415, (not yet reported), this Court, speaking through District Judge Yankwich, said:

"The distinction between a statement with reference to private gossip and scandal and one concerning an act or conduct of public interest is so palpable as to require no elucidation. Consideration of peace and order between individuals calls for repression and punishment of false and defamatory statements of fact concerning the private person. There are equally cogent reasons for liberality of statement in matters of public concern. A citizen of a free state having an interest in the conduct of the affairs of his government should not be held to strict accountability for misstatement of fact, if he has tried to ascertain the truth and, on a reasonable basis, honestly and in good faith believes that the statements made by him are true.' *Bailey v. Charleston Mail Ass'n*, 1943, 126 W.Va.) 292, 306, 27 S.E. (2d) 837, 844

"In order to achieve this result, the comment must satisfy these conditions: (1) it must relate to a matter

of public interest; (2) it must relate not to a person but to his acts. Hence it must not contain imputations of corrupt or dishonorable motives on the persons whose conduct or work is criticized, save insofar as such imputations are warranted by facts; (3) it must be based on facts truly stated; (+) it must be the honest expression of the writer's real opinion on the facts which appear in the publication. *However, misstatements of facts are permissible in the view of the latest authorities.*" (Emphasis ours)

In his concurring opinion, Justice Pope said:

"At the argument counsel for appellant said, in answer to inquiries as to whether the article might not be fair comment, that such defense would not be available because here was a charge of a want of financial responsibility, that this was a statement of fact, not of opinion, and that fair comment cannot cover false statements of fact, citing *Washington Times Co. v. Bonner*, (C.A.D.C. 86 Fed. 2d 836). It is true that there, in laying down the law for the District of Columbia, the court rejected the rule laid down in the leading case of *Coleman v. MacLennan*, 78 Kan. 711, 98 P. 281, that the right of fair comment extends, in the absence of malice, to misstatements of fact. But as Judge Yankwich says, the later, and I think the better considered authorities, disagree with the District of Columbia court. Thus in *Snively v. Record Pub. Co.*, 185 Cal. 565, 198 P. 1, the California court, reversing its previous stand, expressly approved the *Coleman v. MacLennan* rule. I agree that even if we were to find that the article here did contain a statement of fact, yet we should hold that the rule to be applied in Alaska requires that the publication be regarded as fair comment."

It therefore appears that the rule in Idaho and the rule of this Court is that the defenses of conditional privilege and fair comment are available in this case, even if they were based upon misstatements of fact (which is denied in both

cases). The rule announced in the cases cited by appellant is not the law in this jurisdiction.

THE PUBLICATION WAS PRIVILEGED

It seems clear, from the authorities, that the occasion for the alleged libelous publications in these cases was a matter of public interest that would fall within the rule of conditional or qualified privilege, unless for some reason the privilege was lost. While perhaps each incident must be judged by itself, it is a general rule that the official or otherwise public activities of executive, legislative and judicial officers are matters of public interest and fall within the rule of qualified privilege. In *Gough v. Tribune-Journal Co. (Ida.)* 275 Pac. (2d) 663, the Idaho Supreme Court defined conditionally privileged occasions as:

“Occasions conditionally privileged afford a protection based upon a public policy which recognizes that it is essential that true information shall be given whenever it is reasonably necessary for the protection of one’s own interests, the interests of third persons, or certain interests of the public. In order that such information may be freely given, it is necessary to afford protection against liability for misinformation given in an honest and reasonable effort to protect or advance the interest in question.”

Hunt v. Calacino, 114 F. Supp. 254

Cooley on Torts, Sec. 151, pp. 522-524

Griffin v. Opinion Pub. Co., (Mont.) 138 Pac. (2d) 580

Restatement, Law of Torts, C. 25, Sec. 598, pp. 260, 261

This definition is so universally recognized by the courts and text writers alike that a lengthy citation of authorities

would seem superfluous. And it seems equally well settled that, if the facts are not substantially in dispute, the question of whether a particular occasion is privileged is a question of law for the court.

In *Swift & Co. v. Gray*, (9th Cir.) 101 Fed. (2), 976, the rule is stated:

“When the essential facts are not in dispute, the question of whether the communication is privileged is solely a question of law for the determination of the judge. *Jones v. Express Publishing Co.*, 87 Cal. App. 256, 262, Pac. 78; *Newell, Slander and Libel* (4th Ed.) Sec. 345 p. 383.”

Gough v. Tribune-Journal Co., supra

Sylvester v. Armstrong (Wyo.) 84 Pac. (2d) 729

Williams v. Standard Examiner Publishing Co. (Utah) 27 Pac. (2d) 1, 17

Griffin v. Opinion Publishing Co. (Mont.) 138 Pac. (2d) 580

In this case the newspaper accounts were of a meeting the purpose of which was perhaps best expressed in the headlines of the publications. The headline appearing in the *Idahonian* reads as follows:

“GOOD GOVERNMENT ASSOCIATION FORMED
AT PUBLIC MEETING CALLED AT SCHOOL”

The headline in the *Lewiston Morning Tribune* reads:

“GRAND JURY DEMANDED IN ESTES CASE”
(Exhibits 1 and 6.)

The meeting reported in the articles was attended by some 150 to 200 people (R. 253). Its presiding officer was a dean of one of the colleges of the University of Idaho (R. 254). The principal speaker was a Navy captain, commanding of-

ficer of the naval R.O.T.C. unit at the university (R. 245). Among those present was the state District Judge (R. 255). The purpose of the meeting was to organize a group dedicated to securing better administration of government in Latah County and, to that end, to endeavor to obtain the impannelling of a grand jury in Latah County to investigate the conduct of certain of its officials in the handling of the so-called Estes-Shoup criminal cases (R. 246, 254). It is difficult to imagine a graver matter of public concern than maladministration of justice. Certainly maladministration of justice is as grave, or graver, a matter of public concern than occasions held by the courts to be conditionally privileged because of being matters of public concern such as inhuman treatment of a dog (*Broking v. Phoenix Newspapers, Inc.*, (Ariz.) 264 Pac. (2d) 413), the employment of a city official to present a questionable claim against the city (*Griffin v. Opinion Publishing Co.* (Mont.) 138 Pac. (2d) 580), items in a county budget (*Gough v. Tribune-Journal Co.*, *supra*), regulation of airplanes in the territory of Alaska (*Golden North Airways, Inc. v. Tanana Publishing Co.*, *supra*), discharge of a county nurse for alleged unethical conduct (*Reynolds v. Arentz* (D.C. Nev.) 119 Fed. Supp. 82), or even pollution of a public water supply (*Williams v. Standard-Examiner Publishing Co.* (Utah), 27 Pac. (2d) 1). See also 1 Cooley on Torts, (4th Ed.), Sec. 160, pp. 572, 573.

Appellees believe therefore that the Court will not hesitate to hold that the meeting reported in the newspapers and upon which the alleged libel is based was a matter of public concern so that the newspaper reports were qualifiedly privileged, unless for some reason the privilege was lost.

The law seems equally well settled that if the alleged libelous article was qualifiedly privileged then the burden of proof shifts from the defendant to the plaintiff to prove that the alleged libel was actuated from actual malice as distinguished from implied malice.

Chesapeake Ferry Co. v. Hudgins, (Va.), 156 S.E. 429, 438

Broking v. Phoenix Newspapers, *supra*

Sylvester v. Armstrong (Wyo.) 84 Pac. (2d) 729

Montgomery Ward & Co. v. Watson (4th Cir.) 55 Fed. (2d) 184

Williams v. Standard Examiner Publishing Co., *supra*

Griffin v. Opinion Publishing Co. (Mont.) 138 Pac. (2d) 580

In the Chesapeake Ferry case, *supra*, the Virginia court said:

"Malice so imputed is often designated as 'malice in law' to distinguish it from actually existing malice, which is commonly designated as 'actual malice,' 'express malice,' or 'malice in fact.' It is a creature of legal fiction invented to meet the legal fiction that has grown up that malice is an essential element of slander and libel, instead of simply declaring that the unprivileged publication of defamatory matter, false in fact, is actionable whether spoken with or without malice, and in such cases the existence of malice is immaterial unless punitive damages be sought. *Coleman v. MacLennan*, 78 Kan. 711, at page 740, 98 P. 281, 291, 20 L.R.A. (N.S.) 361, 130 Am. St. Rep. 390; *Prince v. Brooklyn Daily Eagle*, 16 Misc. Rep. 186, at page 187, 37 N.Y.S. 250, 251; *Davis v. Hearst*, 160 Cal. 143, 116 P. 530, 538. * * *

"In the instant case the occasion was qualifiedly privileged, the words spoken were within the scope of the privilege which the occasion created, and the extent of the publication did not go beyond the extent of the privilege.

"In such a case, in order to avoid the privilege it is necessary for the plaintiff to show that the words were spoken with *malice in fact, actual malice*, existing at the time the words were spoken; that is, that the communication was actuated by some sinister or corrupt motive such as hatred, revenge, personal spite, ill will, or desire to injure the plaintiff, or what, as a matter of law, is equivalent to malice, that the communication was made with such gross indifference and recklessness as to amount to a wanton or willful disregard of the rights of the plaintiff. *Chalkley v. A.C.L.R. Co.*, 150 Va. 301, 143 S.E. 631; *Strode v. Clement*, 90 Va. 553, 19 S.E. 177; *Aylor v. Gibbs*, 143 Va. 644, at page 648, 129 S.E. 696; *International & G.N.R. Co. v. Edmundson* (Tex. Com. App. 1920) 222 S.W. 181; *Finley v. Steele*, 159 Mo. 299, 60 S.W. 108, 52 L.R.A. 852; *Newell on Slander and Libel* (4th Ed.) Sec. 271, 272, 277; *Sutherland on Damages* (4th Ed.) Sec. 1205; *Odgers on Libel and Slander* (1 Amer. Ed.) 234-238)."

In these cases it seems clear that the plaintiff wholly failed to sustain the burden of proof that the articles were published because of actual malice on the part of the defendants. Neither of the complaints allege actual malice on the part of defendants. The allegations are:

"that such articles and publications were false and untrue, but was written, published and circulated with the intent to, and did, directly, indirectly and by innuendo, accuse the plaintiff of dishonesty, trickery, corruptness and of malfeasance and misfeasance of public office; and with the purpose of destroying plaintiff's reputation, exposing him to public hatred, contempt, ridicule and obloquy, and to deprive him of public confidence." (R. 5)

These allegations are simply conclusions of the pleader. In *Gough v. Tribune-Journal Co.*, *supra*, the Idaho Court said:

"While the complaint characterizes the publication as 'false and malicious,' the allegations appear to be a mere conclusion. *Locke v. Mitchell* (Calif.) 61 P. 2d 922; *Babcock v. McClatchy Newspapers* (Cal. App.) 186 P. 2d 737. Plaintiffs do not say the article contains false statements of fact, or that any statements of fact therein were known by the defendants to be false, or were made by the defendants without any reasonable grounds for belief in their truth, or that the defendants were actuated by a malicious motive to injure the plaintiffs rather than to promote their own, or the public, interest. *In such a case malice cannot be implied.*" (Emphasis ours)

The allegations in the complaints in the instant cases are exactly comparable to those in the Gough case, which the Idaho Court declared were insufficient to imply actual malice in the publication of an article otherwise conditionally privileged.

As pointed out by the Idaho Court in the Gough case, qualified privilege may be lost to the defendant as a defense if the privilege is abused. The Idaho Court said:

"Where the occasion is conditionally privileged the publisher is not liable even though the publication be defamatory, unless he has abused the occasion. See 3 A.L.I., Restatement of the Law of Torts, Sec. 599 to 605 inclusive. *Such an abuse would be the publication of false statements of fact, known to be false, or without reasonable grounds for belief in the truth thereof; or where the publication is not made in good faith for the purpose of protecting the interest for which the privilege is extended, but is maliciously made for the purpose of injuring the person concerning whom it is made.*

Since the allegations of the complaint show that the occasion was conditionally privileged, it was incumbent upon the plaintiff to allege facts which would support proof

that the privilege was abused. 53 C.J.S., Libel and Slander, Sec. 178; *Fedderwitz v. Lamb*, 195 Ga. 691, 25 S.E. 2d 414. While the complaint characterizes the publication as 'false and malicious,' the allegation appears to be a mere conclusion. *Locke v. Mitchell*, 7 Cal. 2d. 599, 61 P. 2d 922; *Babcock v. McClatchy Newspapers*, 82 Cal. App. 2d 528, 186 P. 2d 737. Plaintiffs do not say the article contains false statements of fact, or that any statements of fact therein were known by the defendants to be false, or were made by the defendants without any reasonable grounds for believe (sic) in their truth, or that the defendants were actuated by a malicious motive to injure the plaintiffs rather than to promote their own, or the public, interest. In such a case malice cannot be implied." (Emphasis ours.)

One ground for loss of the privilege is indulgence in language so far afield from the facts and of such a nature that malice in fact appears from the publication itself. Under such circumstances the issue of malice in fact is one for the jury.

Broking v. Phoenix Newspapers, Inc., supra
Emde v. San Joaquin etc. Council, (Cal.), 143 Pac. (2d) 20

A second abuse of the privilege is where the means of publication are so excessive that malice in fact can be inferred in the defamatory matter reaching readers having no common interest in the subject matter of the libel with the author.*

Whether there has been an abuse of the privilege is first a question of law for the court.

Sylvester v. Armstrong (Wyo.) 84 Pac. (2d) 729
Lehner v. Berlin Publishing Co. (Wisc.) 245 N.W. 685

Broking v. Phoenix Newspapers, Inc., supra

*Illustrations of excessive publications may be found in *Browder v. Cook*, (D.C. Ida.) 59 Fed. Sup. 225; *Swift & Co. v. Gray* (9th Cir.) 101 Fed. (2d) 976; *Loeb v. Geronemus*, 66 So. (2d) 241; *Reserve Life Ins. Co. v. Simpson*, (9th Cir.) 206 Fed (2d) 389.

Appellees submit that there is no evidence of abuse of the privilege by them in these cases.

In considering whether malice in fact appears from the alleged libelous language itself, it should be kept in mind that appellees were simply quoting the spoken words of another person. While it is true that repeating defamatory matter first published by another person is not necessarily a defense to a libel action, certainly a newspaper's publishing the quoted words of another negates malicious intent. Try as we may the only language that we can discover appearing in either of the printed articles that could be considered as defamatory of appellant is the statement by Captain Thomas that "had this been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witnesses and come on over." Appellees believe this statement is a fair comment on conceded facts and falls within the rule of fair comment discussed under another section of this brief. In any event we submit that the admitted facts justify the statement to the extent that the qualified privilege was not destroyed. The charge made by Captain Thomas and quoted in the newspapers is a long way from reaching the defamatory matter held not to destroy the privilege in many of the decided cases.*

*Charge of manslaughter, *Williams v. Standard Examiner Publishing Co.*, (Utah) 27 Pac. (2d) 1.

Drunkenness and embezzlement, *Sylvester v. Armstrong*, (Wyo.) 84 Pac. (2d) 729.

Stealing and lying, *Montgomery Ward & Co. v. Watson*, *supra*.

"Damn thief," *McKenzie v. Burns Detective Agency*, (Minn.) 183 N.W. 516.

"Damned thief," *Southern Ice Co. v. Block*, (Tenn.) 189 S.W. 861.

Drunk and boisterous, *Chesapeake Ferry Co. v. Hudgins*, (Va.) 156 S.E. 429.

Since there was no unusual distribution of the published articles there was no excessive publication under which the privilege could be lost. In *I Cooley on Torts*, (4th Ed.) Sec. 158, p. 543, the author says:

"But in the case of a matter of public interest the communication may be made through the ordinary channels of reaching the public or that part of the public which is interested in the communication. If the matter is one of general public interest no difficulty can arise, for all are presumably interested and the communication can reach none who are not. But in matters of local public interest any communication made in the ordinary way, though the public prints may reach those who have no interest, either because they are not residents or taxpayers of the locality, or because they do not belong to the class concerned. *The correct rule would seem to be that the privilege extends not only to the right to make the communication but to the right to make it in the ordinary, usual and only practicable way.*" (Emphasis ours)

In the Gough case, the Idaho Court said:

"The defendant newspaper, being the appropriate and customary medium for the transmittal of communications such as that involved, is privileged in the same manner and to the same extent as the individual defendants. *Gough v. Tribune-Journal Co.*, 73 Idaho 173, 249 P. 2d 192; *Rogers v. Courier Post Co.*, 2 N.J. 393, 66 A. 2d 869; *Caldwell v. Crowell-Collier Pub. Co.*, 5 Cir., 161 F. 2d 333, certiorari denied 332 U.S. 766, 68 S Ct. 74, 92 L. Ed. 351; 53 C.J.S., Libel and Slander, Sec. 121, 123, 131, 132 and 134."

Montgomery Ward & Co. v. Watson, (4th Cir.) 55 Fed. (2d) 184

Coleman v. MacLennan, (Kan.) 98 Pac. 281

Noel, Defamation of Public Officers and Candidates, 49 Col. L.R. 875, 899

Qualified privilege in the law of libel is based upon the legal principle that there must be freedom of speech and freedom of the press if our system of government is to survive. It simply recognizes the fact that the right of the people to speak freely on matters of public concern, when done without malice, outweigh the injury or damage to the person defamed.

Coleman v. McLennan, *supra*

Noel, Defamation of Public Officers and Candidates,
49 Col. L.R. 875

The trial court heard the testimony and saw the witnesses on the witness stand. In directing the jury to return a verdict for the defendants, he said:

"The rule that you cannot criticize those in governmental positions is an old rule and does not exist in this land of ours. Judges and all public officers from the lowest public offices to the highest, are subject to criticism, if the criticism is fair and honest. The people are vitally concerned in the conduct of those that are elected or appointed to public office. The interest of the public here outweighs the interest of the plaintiff or any other individual. The protection of the public requires not merely discussions but information. Conduct and views which some disapprove and others approve are constantly imputed to our public officers. Errors of fact are inevitable and information and discussion will be discouraged and the public interest in public knowledge of important facts will be poorly defended if stating the facts fairly subjects the author or the newspaper publishing the comment to a libel suit without even showing an economic loss. *Public interest outweighs the utterance or publication complained of. There can be no mistake that the author and publisher here stated the facts fairly and without malice.*" (R. 288, 289.) (Emphasis ours.)

Appellees submit that the statements of the trial court are the law of this case and that, the publication being conditionally privileged, the directed verdict in favor of the defendants was proper.

THE ALLEGED DEFAMATORY MATTER WAS FAIR CRITICISM

The defense of fair criticism that denies a plaintiff the right to recover damages in a libel action, in the absence of proof of express malice, is closely aligned to the rule of qualified privilege and, in fact, in many decisions little if any distinction is made between them. The distinction rests in the fact that in the case of qualified privilege liability is denied because of the occasion upon which the defamatory matter is published and is denied, in the absence of special damages, even though the defamatory matter is libelous per se. In the case of fair comment, liability is denied, if based upon the facts as known to the author, when he honestly and without malice, criticizes the conduct of the person defamed. The rule of fair comment is well stated in *Griffin v. Opinion Publishing Co.* (Mont.) 138 Pac. (2d) 580, as follows:

"The public conduct of every public officer and candidate for office is always a matter of public concern in the community in which he holds or seeks office. * * * The concern which all citizens have in the proper conduct of public affairs by public officials requires that they have a wide freedom to discuss among themselves the public conduct of their officers and the qualifications to those who seek public office. Those who hold such offices and those who offer themselves as candidates therefor, by so doing subject their public acts to honest

that they were true, vitiates the defense. As pointed out earlier in this brief, it is the rule of this jurisdiction that misstatements of fact, if made without malice and in an honest belief that they are true, still does not subject the author to liability.

Gough v. Tribune-Journal Co., *supra*.

This does not mean that the rule of fair criticism is unrestricted. Even in those jurisdictions where recovery is denied, even though unintentional misstatements of fact are made, the privilege is lost if based upon facts known to be false. *Gough v. Tribune-Journal Co.*, *supra*. It is also lost if the defendant cannot justify the defamatory statements as substantially true, particularly in cases of defamation on private matters. *Fair Comment*, 62 *Harvard Law Review*, page 1211.

The author in the *Harvard Law Review* further says at pages 1207-1213:

"MATTERS OF PUBLIC INTEREST. — Since fair comment is an affirmative defense, derogating from an otherwise perfected liability, the defendant must satisfy the court that the subject matter of the comment is of such interest to the public that he should be free to make it without paying for the harm he does by defaming the plaintiff. For the most part, agreement on where to draw the line between public and private interest has been as general as agreement that a line should be drawn, although some of the agreed categories are so vague that there is considerable flexibility in application. Thus, it is well settled that subjects of public interest, for this purpose, include the official or otherwise public activities of executive, legislative, or judicial officers, elected or appointed; the public conduct of candidates for elective office so far as pertinent to their election; work done for governmental institutions by independent contractors paid out of public funds; private activities or institutions affecting a substantial number of the public; public per-

formances or exhibitions of music, drama, sports, or works of art; and anything else inviting public attention and approval such as books, articles, or advertisements. * * *

"Despite these qualifications the distinction, more often announced than defined, between comments and statements of fact is often crucial to the outcome of fair comment litigation. If the defense of fair comment did not exist, then when defamatory statements were made that could neither be proved true or false as fact nor be proved correct or incorrect as comment, the conflict of interests would always be resolved in the plaintiff's favor, since the burden of justification is on the defendant. But the formation of public opinion on public affairs is a legitimate function of the press and indeed of any citizen; and both practical experience and modern propaganda research demonstrate that public opinion cannot be formed effectively without resort to statements of the kind described by some logicians as 'meaningless' in the sense that empirical tests cannot establish their truth or falsity, correctness or incorrectness. On the other hand, there is little public interest in protecting the added propaganda effectiveness that stems from the credence mistakenly given to a defamatory statement as one of fact; and such credence enhances the damage done to the reputation of the person defamed. In these circumstances it is submitted that the defense should extend only so far as is necessary to protect statements that the average reader will recognize as statements of opinion although his own thinking may be influenced by the opinions as such. The test, therefore, for distinguishing fact from comment should be as follows: the statement in question should be regarded as one of fact if a substantial number of readers would understand it as intended to convey ideas the asserted validity of which is independent of the belief of the person making the statement. If a substantial number of readers would understand the statement to rest solely on the opinions of the person making the statement, the statement should be regarded as comment and should come within the privilege if the matter is one of public interest."

He concludes, pages 1215-1216:

"Unless shown to be malicious, a defamatory statement found to be comment on a matter of public concern is privileged even if incorrect, illogical, negligently uttered, or harshly phrased; the defendant need not convince the trier of fact that a reasonable man, considering the facts stated or available to the reader, could have made the comment in question. (Emphasis ours.)"

Thus the privilege of what is still often called 'fair' comment ostensibly protects a wide range of violent or vulgar defamatory language. At present the possibility that the privilege will be abused by such invective is partially controlled by the availability to the courts of three limiting devices, each of which properly serves an independent purpose but also is frequently applied to impose liability for comment to which the only real objection is that it 'goes too far.' The violence of the statement may be held to support an inference of malice; the comment may be held to constitute an attack on private character and thence to be no longer upon a matter of public concern; or the statement may be characterized as one of fact, although, from the standpoint of consistency with the ordinary criteria of factual statement, the more violent the language the more obvious it should be to the reader that the statement rests upon no other authority than the opinion of the writer.

"Nevertheless, it must be conceded that fair comment sometimes enables journalists and others to escape liability for defamatory language which offends the taste and moral sense of a substantial part of the community. This occasional abuse is part of the price of free speech; and the only practical alternative — an express rule that the privilege is destroyed if the language 'goes too far' — would encourage a judicial severity more pernicious than the evils it might correct."

While the rule of fair comment may readily be stated in the abstract, its application becomes difficult when the at-

tempt is made to distinguish between statements of fact and comment and criticism. Particularly is this true when the statement contains an expression of the motives of the person being criticized in the performance of the acts complained of. However, it is now generally conceded that imputations of wrongful motives, having a reasonable basis in the known facts, come within the privilege of fair comment.

In 49 *Columbia Law Review* commencing at page 880 the author says:

"Assuming that a statement unquestionably is classed as comment, must the comment be 'fair' in the sense that a person of reasonable intelligence and judgment might possibly agree with it? The name of the defense and the way in which it is pleaded create the risk of an affirmative answer to this question. It is usual for the defendant to plead that the statements of fact contained in the publication are true and that all other statements therein are 'fair' comments on these facts. Actually, however, the requirements as to the fairness of the comment differ considerably, depending on whether the criticism is of activities of public concern or of motives for public acts.

"1. Comment on Activities of Public Concern. Where the criticism is limited to activities of public concern and avoids personal attack, it is not essential that the comment in fact be 'fair' in order to be privileged. As the Restatement of the Law of Torts points out, 'if the public is to be aided in forming its judgment upon matters of public interest by free interchange of opinion, it is essential that honest criticism and comment, no matter how foolish or prejudiced, be privileged.' It follows that the jury may not substitute its judgment on the matter in controversy for that of the defendant, and exclude from the immunity of fair comment all criticism with which it disagrees. The only requirement seems to be

that the facts upon which the opinion is based must be stated or else readily available to the persons to whom the comment is addressed and the comment may not be so completely unrelated to the facts upon which it is made that it may be taken to imply the existence of other undisclosed facts. Where that is the case, the so-called comment in effect is a statement of fact rather than simply criticism.

"2. Comment on Motives for Public Acts. Does the privilege of fair comment include an erroneous statement of an official's motive in performing a public act? It has been said in this connection that 'there is a broad distinction between fair and legitimate discussion in regard to the conduct of a public man, and the imputation of corrupt motives, by which that conduct may be said to be governed.'

"There is a certain logic in classifying a statement of motive as a statement of fact. It has been aptly said in another connection that 'the state of a man's mind is as much a fact as the state of his digestion.' Clearly it is of importance in deciding on the qualifications of a public officer or candidate to know not only how he acted, but what motivated the act. It would be of obvious importance, for example, to know whether a legislator voted for a dry law because he was an ardent prohibitionist or because he wished to aid bootleggers who were profiting from the law. *As one writer puts it, if the privilege of comment excludes statements about motives, the courts are in effect saying: 'You have full liberty of discussion, provided, however, you say nothing that counts.'* (Emphasis ours.)

"In line with these views, it has long been settled in the English courts that imputations of wrongful motives come within the privilege of fair comment. Inferences as to motive, however, unlike inferences relating simply to public activities, must have a reasonable basis, according to the English decisions. Thus in the leading case

of *Campbell v. Spottiswoode*, it is said:

" . . . a line must be drawn between criticism upon public conduct and the imputation of motives by which that conduct may be supposed to be actuated; one man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives unless there is so much ground for the imputation that a jury shall find, not only that he had an honest belief in the truth of his statements, but that his belief was not without foundation."

The author concludes (49 C.L.R. page 903):

"The most needed development, however, is wider acceptance of the rule that there is a conditional privilege to make misstatements of fact. Most of the uncertainty of the law arises from the difficulty of disentangling comment, statements of motives, and statements of fact; this uncertainty would be avoided if all comments and statements about political officers and candidates were conditionally privileged. Such a rule would provide needed encouragement to those who wish to speak out honestly and with due care in the public interest, and the conditional character of the privilege would guarantee adequate protection to officers and candidates."

In the instant case the alleged defamatory matter set forth in the complaints contains no misstatement of fact. In case No. 14469, the first sentence of the alleged libelous matter reads:

"Thomas then made reference to legal maneuvers in . . . which a hearing was set for January 15 at 9 a. m."

This statement is true. It is undisputed. The original complaint was filed in the probate court. The original place fixed for hearing was the courtroom of the probate court, but by reason of voluntary disqualification of the probate judge the case was transferred to appellant's court. Appellant at-

tempted to dissuade the prosecutor from attending the hearing. The hearing was held in the district court courtroom although no formal order was made by appellant changing the place of hearing. The case was dismissed at 9:07 in the morning (R. 226) for lack of evidence. No attempt was made to contact the prosecutor or anybody else although the prosecutor was waiting at the Police Court some four blocks away. To a layman, this tortuous path, ultimately leading to a dismissal of the charge without a hearing, is aptly termed "legal maneuvering."

The next sentence of the alleged libelous matter reads:

"At 8 a. m. that day, Thomas explained, Alsager notified Judge John K. Borg that he would be ready at 9."

That the prosecuting attorney did so notify appellant is admitted (R. 89).

The next sentence in the alleged libelous matter is:

"Alsager and his witnesses were present at police court, normally the place where such hearings are held. But the judge and Estes, Thomas said, had gone to the county courthouse to hear the case."

It undoubtedly will be urged that the statement that the courtroom of the police court "was normally the place such hearings were held" was an erroneous statement of fact. However, there is evidence that preliminary hearings were held at police court, and, in fact, the second preliminary hearing against Estes was set for the police court but after the hearing opened, was adjourned to the district courtroom. In fact appellant himself testified:

"On all my important cases, where the attendance would supposedly be large, I have held them at the Courthouse, rather than at the small room in the Police Station. * * * (R. 103.)

“Q. Did I understand you to say, Mr. Borg, in your last examination by Mr. Tonkoff, that you had never held a preliminary examination in the Police Court?

“A. It is a little hard to determine because it is quite different as to what constitutes a preliminary hearing. I suppose any case where the defendant pleads not guilty it would perhaps be a preliminary hearing, and if that is the case I have certainly had some of those in the courthouse and at the Police Station.” R. 111.)

In any event the statement that the police court “was normally the place where such hearings were held” is certainly not sufficient alone to destroy the privilege of fair comment. In 62 Harvard Law Review, page 1212, the author says:

“The second qualification to the rule that the defendant must justify defamatory statements of fact as true is seen in the cases that appear to apply a looser criterion of truth to statements on matters of public interest than is customary in defamation on private matters. *The American cases, at least, give generous effect to the idea, found also to a lesser extent in defamation on private matters, that the statement need be justified only substantially and not literally, and that if the ‘sting’ of the libel is true, the auxiliary remarks though derogatory need not be justified.* (Emphasis ours.)

The next sentence in the alleged libelous publication is:

“‘This was a ridiculous situation,’ said Captain Thomas.”

This comment was certainly justified under the ludicrous circumstances of a prosecutor and his witnesses appearing at one courtroom while the presiding judge, the defendant and his attorney held court in another courtroom some distance away.

The next sentence in the alleged libelous matter reads:

“A motion for dismissal was made and it was dismissed.”

These facts are admittedly true. (R. 54)

The balance of the alleged libelous matter reads as follows:

“If this had been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witnesses and come on over.”

* * *

“But these things, Thomas said, ‘continue to disturb me:

* * *

“‘3. The extraordinary circumstances in which the first felony was dismissed.

“‘4. Circumstances of the dismissal of the second charge against Estes.

* * *

“‘There is no way to get justice or to correct the faults in the administration of justice * * * without a grand jury,’ Thomas concluded.”

These statements by Captain Thomas clearly are all matters of opinion. In the first sentence wherein Captain Thomas said: “If it had been an honest mistake,” he expressed only his opinion of the motives of appellant in dismissing the first criminal complaint against Estes without having attempted to make any effort to locate the prosecuting attorney or the complaining witnesses (R. 86).

In case No. 14470 the alleged libelous matter is almost identical with the matter set forth in the complaint of case

No. 14469, with the exception of some additional items. The first additional sentence of alleged libelous matter reads as follows:

"The meeting opened with a long and detailed review of the Estes-Shoup case by Capt. Thomas C. Thomas, commander of the University Naval ROTC unit, of which Shoup was a member."

This fact is not disputed (R. 245, 255). The next sentence reads:

"Captain Thomas declared that 'I don't like the smell of it. I don't think we have here in this county now the proper administration of justice.'"

This again is purely an expression of opinion.

The next sentence reads:

"Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol."

The evidence shows without contradiction that Estes went to the campus restaurant, exposed a gun to several people, accused Shoup of insulting his wife, struck him violently in the face, struck the proprietor of the restaurant with the muzzle of a gun in an effort to prevent Shoup's escape, and for a considerable period of time continued to make threats against the boy's life (Exhibit 23). The remaining alleged libelous matter reads:

"What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we'd go through this same rigamarole."

The facts above stated are true and are not libelous. The captain's opinion that "there is no way to get justice or to

correct the faults in the administration of justice * * * without a grand jury" was simply stating a lawful means of correcting what he considered to be a miscarriage of justice. Since the only purpose of the Captain's statements was to secure correction of what he considered a maladministration of justice in the inferior courts of Latah County through the medium of a grand jury, and the calling of a grand jury is sanctioned by the laws of the State of Idaho (Sec. 8, Art. 1, Constitution, Idaho)* his statement could not be considered libelous.

A court cannot impute unlawful or malicious motives to the actor when the things done and the means employed are lawful.

Gough v. Tribune-Journal, Inc., *supra*
 Barton v. Rogers, 21 Idaho 609, 123 Pac. 478
 40 L.R.A. (N.S.) 681

It is the law that, in the absence of actual malice, the severity of language employed in the criticism does not destroy the privilege the law affords fair criticism.

Montgomery Ward & Co. v. Watson (4th Cir.) 55
 Fed. (2d) 184
 Williams v. Standard Examiner Publishing Co. (Utah)
 27 Pac. (2d) 1
 Griffin v. Opinion Publishing Co. (Mont.) 138 Pac.
 (2d) 580
 Sylvester v. Armstrong (Wyo.) 84 Pac. (2d) 729

It is only where the violence of the statement is such as to support an inference of malice that the comment may be held to constitute an attack on private character and tends to be no longer upon a matter of public concern. In Sylvester

*Sec. 8, Art. 1, Constitution, Idaho, is set forth in Appendix B.

v. Armstrong, *supra*, the Wyoming court quoted with approval from *Ashford vs. Newspaper Co.*, 41 App. Cas. 395, 405 and *Odgers on Libel and Slander*, Fifth Edition, p. 394, the rule for determining whether the language used exceeds the privilege of fair criticism as follows:

“Before the inference of express malice can be indulged, the publication must, in comment, be so *excessive, intemperate, unreasonable and abusive* as to *forbid any other* reasonable conclusion than that the defendant was actuated by express malice. * * *”

“But the test appears to be this. Take the facts as they appeared to the defendant’s mind at the time of the publication; are the terms used such as the defendant might have honestly and bona fide employed under the circumstances? If so the judge should stop the case.”

Viewing the undisputed facts in this case from a layman’s standpoint it seems clear that the verbiage used by Captain Thomas in expressing his opinion of the handling of the Estes-Shoup cases was mild. Appellant established this by the testimony of his own witness, former District Judge A. L. Morgan. Judge Morgan testified:

“Q. Was anything said in these conversations regarding John Borg in connection with the dismissal of the two charges which had been filed against Murray Estes in his Court?

“A. What was the question?

“(Previous question read to the witness.)

“A. Well, again I am not sure that I understand that question. Even this afternoon I was talking to one of the nurses here and she said, ‘How is it the lawyers all got off. There must be something crooked or wrong about it.’ * * *” (R. 133)

"Q. You referred to one of the nurses remarking that there must have been something crooked in connection with all lawyers getting off. Were similar remarks made in the discussion by other persons?

"A. With reference to other people, a number of them did inquire as to just why a lawyer could get away with a matter of that kind or a judge would dismiss a case under the circumstances outlined in that article. (R. 134)

Further it appears from appellant's own testimony that the harsh criticism of his conduct over the dismissal of the first case arose long before the alleged libelous publications and continued up to the time they were made. He said:

"Q. After you left the Police Station, during the rest of the day, there was a considerable amount of talk around town about the case being dismissed?

"A. Yes.

"Q. In fact, there was a great amount of talk, wasn't there?

"A. There was quite a bit. I don't know whether it all got to my attention or not.

"Q. You were conscious of the fact that you were being severely criticized for dismissing the case, even in that early afternoon?

"Mr. Tonkoff: That is objected to as calling for a conclusion of the witness and it is outside of the direct examination.

"The Court: He may answer.

"A. Yes.

"Q. Do you recall, Mr. Borg, reading the newspaper articles in the Spokesman Review on the morning of January 16, 1953, about your dismissal of this case?

"A. There were several articles; as far as the dates, I can't say.

"Q. Well, shortly after you dismissed this case, within a day or two (sic) were hearing public rumors of criticism of your action, were you not?

"A. A day or two later there was an article in the Spokesman Review.

"Q. And you wrote a letter to the Spokesman Review about that article, did you not?

"A. Yes, sir; I did." (R. 100, 101) * * *

"Q. You referred to the fact that immediately after you dismissed this case on January the 15th you became conscious that there was a lot of talk and criticism against you?

"A. Yes.

"Q. Did that criticism and what you were conscious of continue up to May 13?

"A. For a considerable length of time.

"Q. You recall when the newspaper articles were published, don't you?

"A. What was that?

"Q. You recall the dates when the newspaper articles were published?

"A. What date?

"Q. Yes, is that date in your mind now?

"A. No, sir.

"Q. Assuming that the newspaper articles came out, the articles that are the subject of this lawsuit, one in the Daily Idahonian and one in the Morning Lewiston Tribune on May 13, 1953 — assuming that was the date, did that criticism and public talk continue up to the date that these articles were published?

"A. Yes, sir." (R. 104)

It is certain the public reaction to the dismissal, long prior to the publication of the alleged libel, was as strong or

stronger than that of Captain Thomas. Such being the case his criticisms did not exceed "fair" comment and are not actionable.

Odgers, Libel and Slander (5th Ed.) p. 394.

THE ARTICLES WERE TRUE AND ARE NOT LIBELOUS PER SE

The defenses that the published articles were true and not libelous per se will be considered together. While there is a great distinction between the defenses of truth and not libelous per se in the instant case, appellees believe the substantial evidence shows that the facts in the published articles were substantially true so that there was no question to submit to the jury on the issue of truth or falsity. Since truth is always a defense to an action for libel, irrespective of how defamatory the published matter may be or how great the damage resulting to the person defamed, it follows that being true, the defamatory matter could not be libelous per se. As heretofore pointed out appellant, in his brief, assumes the alleged defamatory matter to be false and, as heretofore pointed out, the complaint fails to point out what facts are false or upon what basis they are claimed to be false. On pages 30 and 32 of his brief, appellant lists what he considers "would ordinarily and reasonably be understood by an ordinary reader" of the published articles. Of the articles considered in case No. 1950 (No. 14469 in this court), he charges:

"(1) That the plaintiff was a party to legal maneuver preventing the administration of justice.

"(2) That plaintiff ridiculously and without reasonable grounds granted a motion for dismissal in order to defeat justice."

Of the article considered in case No. 1951 (No. 14470 in this court), he charges:

“(1) That plaintiff refused to properly administer justice.

“(2) That plaintiff took part in legal maneuvers making it impossible for the prosecuting attorney to fairly try his case.

“(3) That plaintiff entered into a conspiracy with the defendant in a criminal charge to defeat the administration of justice.

“(4) That the plaintiff was situated in a ridiculous situation in connection with the administration of justice.

“(5) That the plaintiff acted dishonestly in dismissing a criminal charge.

“(6) That plaintiff wilfully failed to administer justice.”

Appellees have no doubt that the appellant will hinge his argument of asserted falsity of the alleged defamatory matter upon the expression of Captain Thomas that “if it had been an honest mistake.” Appellees believe the rule to be that in establishing the defense of truth of an alleged defamatory article it is not necessary to establish the truth of each and every of the alleged defamatory statements but only to such an extent as to establish the substantial truth of the defamatory statements. If the rule were otherwise, in many cases it would be literally impossible to prove the truth of each and every word or phrase in the exact language of the article and would thereby deprive the defendant of the defense of truth in many cases.

"In reaching this conclusion, we have borne in mind, as we must, in determining whether it goes beyond a substantially true statement of the facts, that the whole of the publication must be considered. The fallacy in plaintiff's argument is that it conflicts with this cardinal rule of the law of libel, which 'flatly prohibits' any attempt to wrench a word or a phrase of an article out of context and base an action thereon. The whole of the reported article must be considered in determining whether it is actionable and whether it transcends a substantially true statement of the facts. 53 C.J.S., Libel and Slander, Sec. 10; *Estill v. Hearst Pub. Co.*, 7 Cir. 186 F. 2d 1017, 1021. We conclude, therefore, from a consideration of the whole of the publication, that there is nothing to justify a finding or an inference that the reporter exceeded a substantially true statement of the facts. The essential truth of a news report is always a defense to an action for libel. 53 C.J.S., Libel and Slander, Sec. 122; *Walford v. Herald Printing & Publishing Co.*, 133 Ind. 372, 375, 32 N.E. 929, 930; *Heuer v. Kee*, 15 Cal. App. 2d 710, 59 P. 2d 1063, 1064-5; *State Journal Co. v. Redding*, 175 Ky. 388, 194 S.W. 301, 303. Obviously if the report, admitted to be true by plaintiff's failure to controvert the factual averments made by defendants, was true, it matters not what it reported. It follows that the trial court was not justified in doing other than allow the motion for summary judgment."

Rose v. Indianapolis Newspapers, 213 F. 2d 227

"A plea of justification is sustained by justifying so much of the defamatory matter as constitutes the sting of the charge. It is unnecessary to repeat and justify every word of the alleged defamatory matter if the substance of the charge be justified. If the substantial imputations be proved true, a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than

the actual truth would.'” *Heuer v. Kee*, 15 Cal. App. 2d 710, 59 P. 2d 1063 at page 1065; *Leghorn v. Review Pub. Co.*, 31 Wash. 627, 72 P. 485; *Eddy v. Cunningham*, 69 Wash. 544; 125 P. 961.”

Laughton vs. Crawford, 68 Idaho 578 at 581, 201 P. 2d 96

“It has been held that newspapers are not to be held to the exact facts or to the most minute details of the transactions they publish, that what the law requires is that the publication shall be substantially true, and that mere inaccuracies, not affecting materially the purport of the article, are immaterial. So it has been held that, where the publication complained of was published in good faith and with a belief that it was true, and the evidence shows it to be substantially proved, the defense is complete; that is to say, if the publication made goes no farther than to state the facts of the occurrence or the transaction, and the facts so stated turn out to be substantially proved, no ground will be given for the recovery of damages by one who feels himself aggrieved or injured by such publication.”

53 C.J.S. Sec. 122 at page 201

We further believe the rule to be so well settled as to hardly require a citation of authority that in determining whether an article is libelous per se the courts consider the whole of the defamatory article and not certain isolated words, phrases or sentences appearing therein. Also in determining whether the alleged defamatory matter is libelous in law, it will consider the way in which the article would be understood by the average reader, as to whether the alleged defamatory matter is such as to impeach the honesty, integrity, virtue or reputation of one who is alive, and thereby to expose him to public hatred, contempt or ridicule. *Jenness v. Coop. Pub. Co.*, 36 Idaho 697, 213 Pac. 351. It appears to appellees that

reading the article as a whole clearly indicates that when Captain Thomas used the expression "if it had been an honest mistake" the actual and reasonable meaning and interpretation of those words were that the mistake was unintentional. In other words he intended to convey the meaning that if the facts of the prosecutor and the witnesses appearing at the city hall while the defendant, his attorney and the judge appeared at the district court room had been an unintentional mistake, the mistake could have been rectified by the judge calling the prosecutor and telling him to bring his witnesses and come on over. Appellees believe that the evidence clearly establishes that the dismissal of the first Estes complaint by Judge Borg was intentional and that the uncontradicted evidence so shows. The undisputed facts supporting this claim are as follows:

1. Appellant's attempt to dissuade the prosecuting attorney from attending the preliminary hearing at the meeting at the Elks Club in Moscow on the afternoon of January 14th. (R. 53 and 88)

2. The admitted fact that the prosecutor advised appellant at 8 o'clock on the morning of the 15th that he would attend the hearing. (R. 86-89-165)

3. That appellant made no effort to contact the complaining witness, to procure a court reporter, or to contact any official at the courthouse for permission to use the district courtroom for the purpose of the hearing. (R. 86)

4. That appellant made no effort to contact the prosecuting attorney, the sheriff's office, or any other person to ascer-

tain why the prosecutor and his witnesses had not appeared at the time fixed. (R. 86)

5. The dismissal on motion of counsel for defense within a few minutes after the time fixed for hearing. (R. 227-50-51-86)

6. And most important of all the letter written by appellant to the Spokesman Review on January 16th in which appellant stated, without having heard the witnesses or having any knowledge of what evidence might be produced, if a preliminary hearing had been held, as to the guilt of Estes, that in his judgment Estes was not guilty of the offense charged. (R. 102-103)

7. The admitted statement in the letter to the Spokesman Review that he was negligent in the handling of the case. (R. 103)

Considering these undisputed facts together, no two or more people could conclude otherwise than that appellant, without hearing the proofs, believed that Estes was not guilty of the crime charged, and intentionally dismissed the criminal proceeding without affording the prosecutor the opportunity to appear and present his case. It seems patent, therefore, that the dismissal without a hearing and without attempting to contact the prosecuting attorney, although several telephones were immediately available, leaves no room for doubt but that the judge was intentionally taking advantage of the fact that the prosecuting attorney had appeared at the city hall and hence dismissed the case. If these facts are true, and appellees submit they are undisputed in the record, then we sub-

mit that the expression used by Captain Thomas "that if this was an honest mistake" was true and cannot be considered libelous. It was in this sincere belief that the trial judge made the statement at the time he granted the motion for a directed verdict that "Indeed, it appears to me that there must be considerable imagination injected into any consideration of this, to reach the conclusion that the articles were libelous - much less published with malice." (R. 288)

The only other possible claim of defamatory matter charged in the complaints is quoted language in case No. 14470, reading as follows: "What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we'd go through this same rigamarole. There is no way to get justice or to correct the faults in the administration of justice in Latah County without a grand jury." (R. 6) It appears on the face of this statement that the reference was made to all of the officials of Latah County and others who were involved in the Estes-Shoup matters. These would include the probate judge, the prosecuting attorney, the district judge, Justices of the Peace Borg and Kent Powers and attorney Huff. Since there could be no singling out of any one of them as being the individual toward whom the statements were directed, the charge of libel cannot stand.

In *Golden North Airways, Inc. v. Tanana Publishing Co.* supra, this court, citing many authorities, said:

"The person *to whom* the publication is made must understand to whom it refers. And if the person is not referred to by name or in such manner as to be readily identified from the descriptive matter in the publication

extrinsic facts *must be alleged and proved* showing that a third person other than the person libeled understood it to refer to him. Restatement, Torts, Sec. 564; Gatley on Libel and Slander, 4th Ed., 1953, p. 113; Fraser, Libel and Slander, 7th Ed., 1936, p. 8-9; Odgers, Libel & Slander, 6th Ed., 1929, pp. 123-130; Rhodes v. Naglee, 1885, 66 C. 677, 680, 6 P. 863, 865; Harris v. Zanone, 1892, 93 C. 59, 66-68, 29 P. 845, 846-847; Richardson v. Cooke, 1911, 129 La. 365, 371, 56 So. 318, 320; Washer v. Bank of America, 1943, 21 C. 2d 822, 829, 136 P. 2d 297, 301.

"The complaint in this case is bare of any facts that could actually be called an inducement in the light of which the article can be said to refer to the appellant. Nor is there a direct allegation that any third person understood the article to refer to the appellant corporation. But, laying aside the question of pleading, there remains the *lack of proof*. The appellant did not offer to prove that any person other than itself or its officers understood the article to refer to the appellant. This alone would be fatal to recovery. Marr v. Putnam, 1952, 196 Ore. 128, 246 P. 2d 509, 521; Restatement, Torts, 1938, Sec. 564, Comment B; Note, 41 Cal. L. Rev., 1953, p. 144; Gatley on Libel and Slander, 562-565; State v. Mason, 1894, 26 Ore. 273, 38 P. 130; Yousoupoff v. Metro-Goldwyn-Mayer Pictures, Ltd., C.A., 1934, 50 Times Law Reports 581, 587; 99 A.L.R. 864, 876."

The complaint in the instant case fails to allege and there is a vacuum of evidence in the record to establish that the last quoted remarks of Captain Thomas were directed at appellant. Appellees, therefore respectfully submit that when the articles are read as a whole and in the light of the evident meaning intended to be conveyed by Captain Thomas, and the manner in which his remarks were quoted in the printed articles, the alleged defamatory matter was either true or of

such a nature that it would not stand the acid test of being libelous per se, in the absence of appellant being identified as the intended recipient of the remarks; and, while the trial court did not specifically indicate in his opinion that he was granting the motion for directed verdict on the ground that the alleged defamatory matter was not libelous per se, his action in directing the verdict can be sustained on both grounds.

ERRORS IN RULINGS ON THE ADMISSIBILITY OF EVIDENCE ARE NOT MATERIAL

Nine claims of error are made on the rulings of the trial court in rejecting certain evidence offered by appellant. These are classified for the purpose of argument into four groups as follows:

1. Error in rejecting certain publications appearing in the Daily Idahonian prior to the date of the article in which the claimed libel appears.

2. Error in refusing to admit testimony of certain individuals as to their understanding of what the printed article charged appellant.

3. Refusing to permit opinion testimony as to appellant's duties in conducting a preliminary hearing.

4. Refusal to permit the prosecuting attorney of Nez Percé County, on rebuttal, to testify as to a telephone conversation had with the prosecuting attorney of Latah County.

Appellees deem it necessary to only briefly answer the first of these contentions. In the first place we desire to call

attention to the erroneous statement in appellant's brief that the newspaper articles offered were "prior and *subsequent* publications." (Emphasis ours.) There were no subsequent publications offered. The publications offered in the trial court were four newspaper items appearing in the IDAHONIAN, two, under date of January 16, and one, each, under the dates of April 9 and April 13, 1953.

Appellant contends that these articles were admissible for the purpose of establishing knowledge on the part of appellees in case number 14469, that they knew the alleged defamatory matter was false, that the publications showed evidence of malice and were admissible for the purpose of justifying an award of punitive damages. It was not claimed that there was any defamatory matter in these articles, that they were false in any respect or that appellees in case No. 14469 knew them to be false. Appellees believe the rule to be that subsequent repetitious publications of the alleged defamatory matter are admissible for the purpose of establishing malice and as a possible bearing for an award of punitive damages. However, prior publications entirely innocuous could certainly neither tend to establish false knowledge on the part of the publisher, malice in making the publication in question nor furnish the basis for an award of punitive damages. Appellees submit the ruling of the trial court that these previous news stories had no bearing upon the issues involved in the publication of the article of May 13, 1953, and therefore were immaterial. *Duncan v. Pearson* (4th Cir.) 135 Fed. 2d 146.

As to the three remaining groups of assignments of error on the admission or rejection of evidence, we submit the proffered evidence has no bearing upon the correctness of the

trial court's ruling in granting the motion for directed verdict and could only be concerned with the matter of an award of damages. We believe the rule to be well settled that appellate court will not pass upon the rulings of the trial court if the correctness or incorrectness of those rulings has no bearing upon a determination of the appeal.

CONCLUSION

The right of free speech, a free press, and the right of the people to peaceably assemble to petition their government for a redress of their grievances is guaranteed by the first amendment of the Constitution of the United States, and Section 9 and 10, Article I, of the Constitution of the State of Idaho guarantee the right of free speech and that "the people shall have the right to assemble in a peaceable manner, to consult for their common good; to instruct their representatives, and to petition the legislature for the redress of grievances."

In *Groogan v. American Press Co.*, 297 U.S. 233, 80 L. ed. 660, Justice Sutherland said:

"The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information. The newspapers, magazines and other journals of the country, it is said, to say the least, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. * * * A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."

In this case appellees sincerely submit that the record shows that in printing the address of Captain Thomas they acted entirely without malice toward any individual, including appellant, and only laid before their readers a true and accurate account of a matter which obviously had upset most of the public officials of Latah County, Idaho, as well as a large number of its citizens. They believed it was their duty to fairly and impartially lay before the public a report of that meeting. The trial court was convinced that this was their only motive in making the publication.

The appellees respectfully urge that the judgment of the lower court should be affirmed.

Respectfully submitted,

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APPENDIX A

This is the full context of the published articles of May 13, 1953, both of which are attached:

-2-IDAHONIAN -: Moscow, Wednesday, May 13, 1953

GOOD GOVERNMENT ASSOCIATION FORMED AT PUBLIC MEETING CALLED AT SCHOOL

A faction of the Moscow population, numbering some 175 persons, not satisfied with recent actions which brought an abrupt conclusion of the legal cases involving a Moscow attorney and a University of Idaho student, went on record at a public gathering last night "requesting a grand jury" call to clear away what the group called a "miscarriage of justice."

The gathering at Moscow high school last night was called in protest to the actions growing out of incidents at the Perch a campus restaurant, last December 14, involving Richard Shoup, university student, and Murray Estes, local attorney.

This morning, District Judge McQuade, upon whose order rests a call of a grand jury, said he would recommend to Latah county Prosecuting Attorney Melvin Alsager that a "full and complete investigation be conducted in the Estes Shoup cases even to the point of hiring a qualified investigator." McQuade said he would recommend approval to the county commissioners the use of the prosecutor's contingency fund for financing such an investigation.

"Following such an investigation, should facts warrant the filing of informations in the cases," Judge McQuade said he would then consider "a future course of action, whether it be through the local judicial level or through call of a grand jury."

Judge McQuade, in attendance at last night's session and frequently called upon to answer questions during the so called "free forum," repeated his earlier remarks that "I will not call a grand jury if the basis of the call is on rumor alone because I won't see innocent people hurt."

LENGTHY REVIEW

Last night's session opened (following selection of Dean D. S. Jeffers of the university Forestry School as temporary chairman) with a detailed review of the Estes-Shoup cases by Capt. Thomas C. Thomas, commander of the university naval ROTC unit, of which Shoup was a member.

Captain Thomas presented his interpretation of the incidents which began at a party at the Idaho Ad club, at which Estes was present, and continued through the alleged altercation at the Perch and subsequent legal maneuvers which concluded last week with a plea of guilty to a battery charge by Estes, and dismissal of charges by Estes against Shoup charging an attempt to compound a felony.

Thomas reported certain facts and incidents which have never before been told publicly and were not a part of any court record . . . they, if they are true, could change matters considerably."

ONLY ONE SIDE

When asked by Mrs. Helen Howard "if Captain Thomas' facts are true, would you accept that as sufficient evidence for calling of a grand jury?", Judge McQuade answered: "If they are all true and there are no explanatory facts which neutralize them, it would be proper to bring in a grand jury. But the captain has brought in only one side of this case."

McQuade, after complimenting Captain Thomas for his detailed review and its presentation, declared the navy man had put forth only facts which were favorable to his side.

Last night's meeting came about as a result of an earlier refusal by Judge McQuade to call a grand jury to investigate possible evidences of injustices during the four-month course of the Estes-Shoup cases.

During the course of the three-hour session last night, motions from the floor resulted in the following actions:

FOUR STEPS

1. Formation of an organization to be known as the provisional Latah County Good Government association.

2. Authorization of the temporary chairman to appoint committee to poll Latah county residents on the question of whether they want a grand jury impaneled.

3. Selection of a committee, made up of Jeffers, Malcolm Neely, Carman Mell, Moscow; William McCreerey, Kendrick, and J. O. Broyles, Potlatch, to put forward a slate of officers, draw up an organizational plan and arrange for future meetings.

4. Requested the temporary chairman to inform Judge McQuade that it was the desire of the group that a grand jury be called.

It was upon the issuance of the statement by Chairman Jeffers to McQuade revealing the desire of the group that Judge McQuade repeated his stand that he would "not call a grand jury on rumor alone."

Both sides of the issue were presented at the session. The Rev. W. W. Prall, speaking as a "private citizen," urged more investigation. "Let's find out first, what a grand jury can do. To be perfectly frank, all I have heard is rumor and I doubt if you can investigate a rumor."

He also explained that he "did not believe that at the moment there is anything on which the judge could impanel a grand jury."

NEEDS EVIDENCE

To which Judge McQuade replied: "All the petitions in the world won't find a man guilty. The only thing that means anything is evidence. I'm not going to call the grand jury. I'm not going to take a chance of having people hurt."

In his detailed review of the cases, Captain Thomas said that shortly after the party at the Idaho Ad club at which both Estes and J. M. O'Donnell, then county prosecuting attorney, were present, Estes went to the Perch and accosted Shoup. The proprietor of the cafe intervened and police were summoned.

The first police officer who arrived, Captain Thomas said, allowed Estes to depart "and did not take his pistol from him. The second officer, he said, arrived and took Shoup to jail."

where he was questioned "for quite a considerable time."

"It was then thoroughly established," Thomas said, "that he was completely innocent, and later Estes admitted that it had been a case of mistaken identity."

After several instances where Shoup had been dissuaded from filing any charges against Estes, a charge was filed soon after Melvin Alsager took office as prosecuting attorney, some four weeks after the incident, Thomas said.

Thomas then made reference to legal maneuvers in which a hearing was set for January 15 at 9 a. m. At 8 a. m. that day, Thomas explained, Alsager notified Judge John K. Borg that he would be ready at 9. Alsager and his witnesses were present at police court, normally the place where such hearings are held. But the judge and Estes, Thomas said, had gone to the county courthouse to hear the case.

RIDICULOUS SITUATION

"This was a ridiculous situation," said Captain Thomas. A motion for dismissal was made and it was dismissed. "If this had been an honest mistake, it could have been easily rectified by lifting a telephone and telling the prosecutor to bring his witness and come on over."

A second felony charge was filed a few days later but this also was dismissed, Captain Thomas said, on the ground that there was insufficient evidence upon which to bind Estes over.

In the meantime, Captain Thomas explained, the boy (Shoup) was undergoing a strain which was evidenced in bad grades and a possibility he would be expelled from the naval ROTC.

"At the end of January," Thomas continued, "the individual who caused the trouble was scott free and the victim was subject to dismissal from the navy and in danger of losing his chance to become a naval officer. It was simply not right."

Later Shoup's parents came from McKeesport, Pa., and it was agreed then that a simple battery action would be brought against Estes. This third charge was filed soon after Easter, Thomas added.

Captain Thomas then charged that Probate Judge Lloyd Martinson had attempted to hold a "quiet, closed trial." Alsager was told to bring in the boy and no other witnesses, Thomas said. The prosecutor at first agreed and "then when he realized what was happening, he properly refused to go along with it."

The next day a charge was filed against Shoup alleging that he had attempted to compound a felony. Thomas said that this charge could not have stood up in court.

CITES STATEMENT

On April 23, Captain Thomas said McQuade held a conference in which he dissuaded Thomas from allowing his secretary to take notes. He went on that the following day an article appeared in the Daily Idahonian which quoted Judge McQuade as saying that an agreement had been reached by all principals in the case and that there was no justification for calling a grand jury.

Thomas said the story quoted McQuade as saying that attorneys for both sides objected to the expense of a grand jury except as a last resort. Thomas said that was erroneous, that no such agreement was reached.

On May 5, Thomas continued, there was another effort to hold a quiet trial, but that Alsager again refused, saying a public trial had been set for May 6 and that was when he intended to have it.

Estes appeared privately before the judge, pleading guilty to the charge of battery and was fined \$100. After Estes' conviction, the charge against Shoup was dismissed.

"At long last," Captain Thomas said, "we had Shoup freed. But these things," Thomas said, "continue to disturb me."

"1. Failure of the police to arrest Estes.

"2. Failure of the police to take the pistol from Estes.

"3. The extraordinary circumstances in which the first felony was dismissed.

"4. Circumstances of the dismissal of the second charge against Estes.

"5. The reason for the steps which McQuade took to avoid calling a grand jury."

"What to do about it? There has been no change in the local set up since December. The same faces hold office. The same thing could take place and again we'd go through this same rigamarole. There is no way to get justice or to correct the faults in the administration of justice . . . without a grand jury," Thomas concluded.

It was then that Judge McQuade took the floor to offer rebuttal to the statements made by Captain Thomas and to present his reasons for refusing to call a grand jury.

OTHERS SPEAK

Following Judge McQuade's dissertation, Chairman Jeffers declared a "free forum" and limited each speaker to three minutes.

Mrs. Bernice Brigham, Gencsee, declared "this is not the only case of miscarriage of justice here" and added "it is only an indication of the type of justice Latah county has had for a long time."

Dr. R. E. Hosack, another faculty member, said he had been "disturbed by a feeling of uncertainty on the part of Moscow residents over the way local justice has been handled."

"I am also disturbed when a judge throws cold water in the face of the ancient and honorable institution of the grand jury. I think a grand jury would clear the air."

Clifford I. Dobler, law instructor, said, "I don't teach about grand juries, but last week I got hold of a book called the Idaho Code. I found that 16 grand jurors get \$4 a day for every day they meet plus 15 cents a mile traveling money." Thus, he said, a grand jury "would not be so expensive as Judge McQuade had intimated." And, he added, "the only people who could be injured are the guilty parties."

McQuade corrected Dobler by stating that grand jurors now get \$6 daily plus 25 cents mileage, which would amount to about \$96 daily while in session, in addition to costs necessary to subpoena witnesses.

CITES EXAMPLE

McQuade made reference to a recent call to southern Idaho where he had tried grand jury indictments. In Bingham county, he said, seven men were indicted and not one convicted. But, he said, that in order to meet their legal expenses, they had all mortgaged their homes, sold their furnishings and cars, borrowed on life insurance and from friends and relatives.

"That's what I mean when I say innocent people can be hurt."

Among the other brief comments from the floor was that made by Alsager who said: "My difficulty with the Estes case has been mostly with the lower court judges. They seem to be cooperating with the defendant more than with me. I don't mean they should side with me, but they should help me get a case to the right court at the right time."

This morning Mrs. R. E. Hosack gave this statement to the Idahoian:

"As president of the Moscow Council of Church Women I wish to make it clear that the reports in the newspaper associating the Council, in my name, with the preliminary arrangements for the public meeting held in the high school Tuesday evening to discuss the administration of justice in Latah county, were erroneous and misleading. The Moscow Council of Church Women was in no way associated with the arrangements for this or any other meeting for this purpose. Any connection which I have had with this matter has been purely in the capacity of a private citizen."

GRAND JURY DEMANDED

BY LADD HAMILTON
(Tribune Staff Writer)

MOSCOW — The most famous legal case in recent Moscow history, which apparently had simmered down last week, boiled over again Tuesday night amid demands for a grand jury investigation.

About 200 Latah County residents gathered at Moscow High School to protest what one of them termed "a miscarriage of justice" growing out of an incident at a University of Idaho Campus cafe last Dec. 14, involving Richard Shoup, a university student, and Murray Estes, Moscow attorney.

Shoup had charged Estes, after the Dec. 14 affair, with assault with a deadly weapon, and after a long series of legal maneuvers, Estes pleaded guilty last week to a reduced charge of battery and, last week, also, a case which Estes had brought against Shoup, charging an attempt to compound a felony (bribery), was dismissed.

Tuesday night's public meeting came about as the result of an earlier refusal of District Judge Jack McQuade to call a grand jury to investigate possible evidences of injustices during the four-month course of the case.

Among other things, the group:

1. Formed a permanent organization called the Latah County Good Government Association;
2. Agreed that a nominating committee be named to put forward officers, draw up an organizational plan and arrange for further meetings;
3. Authorized D. S. Jeffers, Moscow, chairman of the meeting, to appoint a committee which will poll county residents on the question whether they want a grand jury impaneled;
4. Requested Jeffers to inform McQuade that it was the desire of the group that a grand jury be called.

The meeting opened with a long and detailed review of the Estes-Shoup case by Capt. Thomas C. Thomas, commander of the University Naval ROTC unit, of which Shoup was member.

Captain Thomas declared that "I don't like the smell of it. I don't think we have here in this county now the proper administration of justice."

He said the difficulty involving Estes and Shoup began at a party at the downtown Moscow Ad Club which Estes and Maury O'Donnell, who was then prosecuting attorney, both attended.

Shortly after this party, Captain Thomas said, Estes went to the Perch, a campus restaurant, and there accosted Shoup with a pistol. He did not fire the weapon. The proprietor of the cafe intervened and called police.

DIDN'T TAKE GUN

The first officer who arrived, Captain Thomas said, allowed Estes to depart "and did not take his pistol from him." The second officer, he said, arrived and took young Shoup to jail where he was interrogated "for quite a considerable time."

"It was then thoroughly established," Thomas said, "that he was completely innocent, and later Estes admitted that it had been a case of mistaken identity."

Thomas said that Shoup had been dissuaded on numerous occasions from filing any charges against Estes. He pointed out that the first charge was not filed against Estes until about four weeks after the incident had occurred. It was not filed, he said, until Melvin Alsager had replaced O'Donnell as prosecuting attorney.

"Within an hour after Alsager took office the charge was filed," Thomas said. But he added that subsequent legal maneuvers had made it impossible for the prosecuting attorney to get a trial on that charge. He said that it was brought to justice court, scheduled for a hearing at 9 a.m. on the morning of Jan. 15. At 8 a.m. that morning, Thomas said, Alsager called the judge and told him that he would be ready at

At 9 a.m., he added, the prosecuting attorney and witnesses and the court reporter appeared at the police court.

normally the place where the hearing would be held. But the judge and Estes had gone in the meantime to the district courtroom to hear the case.

"This was a ridiculous situation," Thomas said.

"Counsel for Estes moved that the case be dismissed and it was. If this had been an honest mistake it could have been easily rectified simply by lifting a telephone and telling the prosecuting attorney to bring his witnesses and come on over."

A second felony charge was filed a few days later, the captain said, but this was also dismissed on the ground that there was insufficient evidence upon which to bind Estes over.

"And in the meantime," the captain added, "what has happened to the boy?"

"The strain of the hearing and other legal rigamarole had gotten him down and at mid-year Shoup did badly at his exams. We would have had to drop him from Naval ROTC for poor grades, but with the full concurrence of President (J. E.) Buchanan, we sent a plea to the Navy Department that he be allowed to remain with us for one more term.

"At the end of January, the individual who caused the trouble was scott free and the victim was subject to dismissal from the Navy and in danger of losing his chance to become a Naval officer. It was simply not right."

Later, he said, Shoup's parents came here from McKeesport, Penn., and it was agreed then that a simple battery action would be brought against Estes. This third charge was filed shortly after Easter.

Captain Thomas said that McQuade had attempted to hold "quiet, closed trial." Alsager was told to bring in the boy and no other witnesses, Thomas said.

(Continued on Page 5)

GROUP DEMANDS GRAND JURY ON ESTES CASE

(Continued from Page 12)

Alsager had first agreed, but then "when he realized what was happening, he properly refused to go along with it."

The next day a charge was filed against Shoup alleging that he had attempted to compound a felony. Thomas said this charge was "phoney and false" and could not have stood up in court.

He said that on April 23 McQuade held a conference in his chambers and that McQuade had dissuaded Thomas from allowing his secretary to take notes. Thomas said he requested that the court reporter take notes and was again dissuaded. Nothing came of that conference, Thomas said.

He said that on the following day he saw an article in the Moscow Daily Idahonian which quoted McQuade as saying that an agreement had been reached by all the principals in the case and that there was no justification for calling a grand jury.

He said the story quoted McQuade as saying that attorneys for both sides objected to the expense of a grand jury except as a last resort. Thomas said that was erroneous, that no such agreement was reached.

On May 5, he said, there was another effort to hold a quick trial, but he added that Alsager again refused, saying a public trial had been set for May 6 and that was when he intended to have it.

Estes appeared privately before the judge, pleaded guilty to the charge of battery and was fined \$100. After Estes' conviction, the charge against Shoup was dismissed.

"At long last," Captain Thomas said, "we had Shoup freed. But Thomas said these things disturbed him:

"The failure of the police to arrest Estes on Dec. 14 or to take away his pistol;

"The extraordinary circumstance of dismissing the first battery charge while the prosecutor was in the regular courtroom and the judge and defendant were in another;

"Circumstances of the dismissal of the second charge against Estes;

"The reasons for the unusual steps which McQuade took to avoid calling a grand jury . . ."

"What to do about it? There has been no change in the local setup since December. The same faces now hold office. The same thing could take place and again we'd go through this same rigamarole. There is no way to get justice or to correct the faults in the administration of justice in Latah County without a grand jury."

Captain Thomas retired amid heavy applause.

McQuade then declared that Captain Thomas had put forward only the facts which were favorable to his side. And McQuade heatedly denied that he had said what the Moscow newspaper quoted him as saying about the grand jury.

He also denied that he would not allow notes to be taken in his conference with the parties to the case.

He said he had told Thomas it was to be an informal meeting "to get rid of these cases in an orderly manner. It has been my observation that people are reluctant to talk when someone is making notes. I didn't deem it necessary to have the reporter there.

He also said that Thomas had not pressed him for provision to have notes taken, but had asked him merely "would you rather I didn't?"

McQuade said, "I repeated throughout the conference that I had called it for the purpose of enlisting their aid in ending this farce that was growing like a mountain. I said it will have a serious effect on the community and the university. As for the grand jury, I hadn't made up my mind."

McQuade said that during this conference he told the attorneys that "I will call the grand jury unless you, Estes, and you, Alsager, stop playing around. I said if you don't do something I'll not only call the grand jury, but I will institute disbarment proceedings against both of you."

"As far as I am concerned, I have not abandoned consideration of the grand jury. I carry no banner for any side in this case. But I am afraid of injuring a number of innocent people as I know is sometimes the case with a grand jury."

At this point Dr. Hugh Burgess of Moscow offered a motion that the Latah County Good Government group be formed. The motion passed 132 for and 8 against after brief discussion.

A motion then was made that Jeffers, as temporary chairman, name a nominating committee to include himself, McCorm Neely, the Rev. Carman Mell, Moscow minister, William McQuary, Kendrick newspaper publisher, and Jim Broyles, Potlatch farmer. This motion carried unanimously.

HINTS AT OTHER CASES

Mrs. Bernice Brigham, Genesee, declared that "this is not the only case of miscarriage of justice here" and she added that "it is only an indication of the type of justice Latah County has had for a long time."

Dr. R. E. Hosack, University instructor, said that he had been "disturbed by a feeling of uncertainty on the part of Moscow residents over the way local justice has been handled."

"I am also deeply disturbed when a judge throws cold water in the face of the ancient and honorable institution of the grand jury. Grand juries can take the kind of evidence McQuade said he cannot take. I think a grand jury would clear the air."

Clifford Dobler, University law teacher, said that "I don't teach about grand juries but last week I got hold of a book called the Idaho Code. I found that 16 grand jurors get \$6 a day for every day they meet plus 15 cents a mile or way for traveling money." Thus, he said, the grand jury would not be so expensive as McQuade had intimated.

And he added that "the only people who could be injured are the guilty parties."

McQuade offered a correction. He said that grand jurors now get \$6 daily plus 25 cents mileage, which would amount to about \$96 daily while they were in session.

He said he had just returned from South Idaho, where he had observed grand juries in action. In one county, he said, seven men were indicted and not one of them was convicted. But he said that in order to meet their legal expenses, they had all mortgaged their homes, borrowed on their life insurance.

ance, borrowed from relatives and finally had been given a sum of \$13,000 which was gathered by public subscription.

"That's what I mean when I say innocent people can be hurt."

'IMMUNITY' CITED

Dr. Paul Eke, former University instructor, said "there is a feeling in this community that people in certain classes are immune to the law. The best thing for us would be a complete change from top to bottom."

Hosack declared that it would be worth \$96 plus expenses to clear the good name of Latah County and he then moved that a group be appointed to canvass the county on the question. The motion passed 63 to 35.

The Rev. W. W. Prall, Presbyterian minister, urged further investigation. "Let's find out first what a grand jury can do," he said. "To be perfectly frank, all I have heard is rumor and I doubt if you can investigate a rumor."

Alsager said a grand jury does have greater power than a prosecuting attorney.

"My difficulty with the Estes case," he went on, "has been mostly with the lower court justices, who seem to be cooperating with the defendant more than with me. I don't mean they should side with me, but they should help me get a case to the right court at the right time."

Dr. Prall said that "I don't believe that at the moment there is anything on which the judge could impanel a grand jury."

To which McQuade replied, "Dr. Prall has put a finger on it. All the petitions in the world won't find a man guilty. The only thing that means anything is evidence. I'm not going to call the grand jury. I'm not going to take a chance on having people hurt."

Mrs. Helen Howard asked him, "If Captain Thomas' facts are true would you accept that as sufficient evidence for the calling of a grand jury?"

McQuade replied, "If they are all true and there are no explanatory facts which neutralize them, it would be proper to bring in a grand jury. But the captain has brought in only one side of this case."

APPENDIX B

Constitution of the State of Idaho, Article 1, Section 8.

"Prosecutions only by indictment or information. — No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate, except in cases of impeachment, cases cognizable by probate courts or by justices of the peace and in cases arising in the militia when in actual service time of war or public danger; provided, that a grand jury may be summoned upon the order of the district court in the manner provided by law, and provided further, that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefor, upon information of the public prosecutor."

APPENDIX C

In *Sweeney vs. Patterson*, 128 Fed. (2d) 457, the Circuit Court for the District of Columbia said:

"Even if the italicized statements are false, appellant has stated no claim on which relief can be granted. The cases are in conflict, but in our view it is not actionable to publish erroneous and injurious statements of fact and injurious comment or opinion regarding the political conduct and view of public officials, so long as no charge of crime, corruption, gross immorality or gross incompetence is made and no special damage results. Such a publication is not 'libelous per se.' We need not consider whether it is privileged. Appellant might be entitled to relief if he had lost his seat in Congress, or had lost employment, as a lawyer or otherwise, had been put to expense, or had suffered any other economic injury, by reason of appellees' statements. We do not decide that question, since it is not before us. Appellant alleges no such injury.

"Cases which impose liability for erroneous reports of the political conduct of officials reflect the obsolete doctrine that the governed must not criticize their governors. Since Congress governs the country, all inhabitants, and not merely the constituents of particular members, are vitally concerned

the political conduct and views of every member of Congress. Everyone, including appellees and their readers, has an interest to defend, and any one may find means of defending it. The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen. Errors in fact, particularly in regard to a man's mental states and processes, are inevitable. Information and discussion will be discouraged, and the public interest in public knowledge of important facts will be poorly defended, if error subjects its author to a libel suit without even a showing of economic loss. Whatever is added to the field of libel is taken from the field of free debate. If other public interests are thought to outweigh, in respect to some utterances, the public interest in knowledge and debate, they call for legislative changes in public law rather than judicial changes in the law of libel."



No. 14472

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

MONSANTO CHEMICAL COMPANY, RESPONDENT

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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FILED

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No. 14472

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MONSANTO CHEMICAL COMPANY, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order (R. 36-38)¹ issued against respondent on May 27, 1954, pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151 et seq.).² This Court has jurisdiction under Section 10 (e) of the Act because the unfair labor practices in question took place at re-

¹ References designated "R" are to the pages of the printed record. Whenever, in a series of references a semicolon appears, the references preceding the semicolon are to the Board's findings, and those following are to the supporting evidence.

² The pertinent provisions of the Act are set out in the Appendix, *infra*, pp. 16-18. The Order of the Board is printed in 108 N. L. R. B. No. 151.

spondent's plant near Soda Springs, Idaho, within this judicial circuit.³

STATEMENT OF THE CASE

I

The Board's findings of fact

Briefly, the Board found that respondent violated Section 8 (a) (1) of the Act by refusing to permit the International Association of Machinists, herein called the Union, to distribute union literature on respondent's parking lot during the employees' non-working time. The subsidiary facts on which this finding rests may be summarized as follows:

A. Introduction—the location of the plant and the parking lot

Respondent's plant is located on a 500-acre tract of of land about one mile from the limits of the town of Soda Springs, Idaho, a community of about 2,000 inhabitants (R. 8-9; 155-156, 187). The plant, which operates seven days a week on a 3-shift 24-hour basis with a total payroll of about 130 employees, is set back from the highway and is reached by a private company road approximately four-tenths of a mile long (R. 9; 63-64, 125, 164-166). As a driver

³ Respondent, a Delaware corporation with plants in several States, is engaged in the manufacture of heavy chemicals, organic chemicals, and intermediates. This proceeding involves solely respondent's plant at Soda Springs, Idaho, which annually purchases materials valued in excess of \$100,000 of which approximately 75 percent is shipped to the plant from points outside the State of Idaho. In addition, this plant annually manufactures and ships products valued in excess of \$100,000 to points outside the State of Idaho. Respondent concedes that it is subject to the jurisdiction of the Board (R. 7-8; 1-2, 4).

approaches the main plant building by the company road, he reaches first a combination administration and service building on the left hand side of the road. Immediately in front of him is the main gate of the plant. To the driver's right, across the road from the administration and service building, is the rectangular parking lot involved in this case (R. 9-10; 109, 188). Employees arriving for work park their cars on the parking lot, walk across the company road, enter the administration and service building to change their clothes and punch the time clock, and then emerge from this building and enter the plant proper by the main gate. When they leave, this procedure is reversed (R. 10; 109).

As cars leave the plant along the company road, they encounter a "stop" sign about 60 feet before they enter the main highway (R. 12; 66, 188, 193). The company road curves in a southerly direction and meets the main highway at an angle of about 30 degrees so that cars which are proceeding to Soda Springs bear only slightly to the right to enter the highway (R. 12; 68, 109-110, 127-129, 188, 193). The terrain is flat and treeless and the view of the main highway, which is very lightly traveled, is unobstructed for a long distance in both directions (R. 12; 111, 193). Consequently, as discussed *infra*, the employees habitually ignore the "stop" sign.

Eighty-eight, or approximately two-thirds, of respondent's employees live in Soda Springs (R. 25; 156, 189-191). The remaining 42 live elsewhere, approximately half of them within a 12-mile radius of Soda Springs, and the other half at a distance of

17 to 39 miles from the plant (R. 25; 189-191). All the employees ride to work in private automobiles (R. 25; 153).

B. The attempt to organize the plant in January and February 1953

On January 22, 1953, A. L. Phelan, a representative of the Union requested permission of resident plant manager Gurvin to distribute union literature, copies of which he handed Gurvin, at the plant gate to the employees as they came off their shift (R. 13; 58-60). Gurvin refused, stating that it was contrary to company policy to permit the distribution of literature on company property (R. 13; 61-62).

Phelan then began a persistent but largely fruitless effort to distribute union literature at the intersection of the company road and the highway. About midnight on January 22, he stationed himself about midway between the "stop" sign and the highway in order to hand literature to employees both entering and leaving the plant at the change of the night shift. Since there were cars both entering and leaving the property at this time, and since most of them carried only the driver, Phelan found it necessary to stand in the middle of the road in order to be in a position to reach the drivers (R. 13-14; 68-69, 106). Phelan discovered, however, that despite the "stop" sign, drivers leaving the plant approached the intersection at the rate of 25 or 30 miles an hour, slowed down only momentarily upon reaching the intersection, and then proceeded immediately into the highway; drivers entering the plant did not slow down at all. None stopped to receive the proffered literature. (R. 14;

69-70.) The following morning Phelan returned to the same spot at about 8 a. m., as the day shift entered the plant, and again in the afternoon when the day shift left the plant. In the morning none of the 25 or 30 cars entering the plant, and only 3 of the 5 or 7 cars leaving the plant, stopped. In the afternoon, Phelan wore a western type hat and a long leather jacket. All but one of the 25 cars that left the plant stopped, and 5 of the drivers told him that they had thought that he was the county sheriff. None of the 7 or 8 cars that entered the company road stopped (R. 14; 74-76, 102).⁴ Phelan made a fourth attempt to distribute literature at the intersection on the afternoon of February 9. On this occasion, 2 of the 25 cars leaving the plant stopped, and 3 others were compelled to stop because they were behind these 2. None of the cars entering the plant stopped (R. 14-15; 78-80). Except for the afternoon when he was mistaken for the sheriff, only 8 of the 80 or 90 cars which had passed Phelan on his 4 trips to the intersection had stopped to receive his literature. Phelan found, furthermore, that it was hazardous to stand in the middle

⁴ Phelan testified without contradiction that W. T. Dunlap, the production superintendent of the plant, told him in a conversation in September 1953 (see *infra*, p. 7), that the company had had "trouble" with employees not stopping at the stop sign, and that the sheriff "had come out there at different times and stationed himself there," and Phelan understood that some of the employees had been fined for not stopping at the highway (R. 87-88). It may be noted that although cars leaving the company road were confronted with the stop sign, and an individual whom they apparently mistook for the county sheriff upon this occasion, those entering the company road were not confronted with any sign designed to regulate their speed and did not stop.

of the road at the intersection. He testified that on the morning of January 23, the road surface was frozen and slippery, and on the afternoon of that day it was "sloppy" and that he spent much of his time dodging back and forth in an effort to avoid being sprayed with slush (R. 71, 76). On February 9, the ground was covered with snow (R. 78).⁵

Due to the pressure of other duties, Phelan temporarily suspended his attempts to organize the plant after February 9, 1953, and did not return to this task until September 1953 (R. 15; 99-100).

C. The attempted distribution of literature in September and October 1953

In August 1953, the Company promulgated, included in its new personnel manual, and circulated to its employees, rules which prohibited the circulation of petitions, or the posting or distribution of any literature on company property without the approval of the plant manager (R. 10; 137-139, 189).

On September 28, 1953, Phelan and W. T. Wright, the newly appointed business representative of the union (R. 15; 112), handed the guard at the plant gate a sample of some union literature, stating that they wished to distribute copies of this literature to the men at the end of the shift (R. 15; 83-84). The guard stated that this was forbidden by company rule.

⁵ Since the events of January and February 1953 occurred more than 6 months before the filing of the charge herein, the Trial Examiner considered such events as background material only (R. 13, n. 1). *N. L. R. B. v. Clausen*, 188 F. 2d 439, 443 (C. A. 3), certiorari denied, 342 U. S. 868; *N. L. R. B. v. General Shoe Corp.*, 192 F. 2d 504, 507 (C. A. 6), certiorari denied, 343 U. S. 904. The Board's findings are based on the events of September and October 1953 (R. 15-17).

They then asked to see the resident manager, and, in his absence, the guard took them to the office of the production manager, W. P. Dunlap (R. 15; 84). Dunlap refused their request for permission to distribute union literature on the parking area, stating that the distribution of any literature on company property was against company policy, and that if the union were to be granted such permission, other labor organizations would also seek it (R. 15; 86-88). Phelan spoke of the difficulty and hazard of attempting to distribute literature at the intersection of the company road and the highway, and stated that for one thing the cars leaving the property did not comply with the "stop" sign. According to Phelan's uncontradicted testimony, Dunlap replied that he was aware that the company was having difficulty in getting employees to obey the stop sign, and agreed that the company had an advantage in contacting the employees (R. 15-16; 87-88, 98). The interview then terminated and Phelan and Wright stationed themselves at the intersection of the 2 roads and attempted to distribute literature again as Phelan had during the preceding January and February. None of the 5 or 6 cars leaving the plant stopped at the intersection (R. 16; 90-91, 113-114).

On the morning of October 1, Phelan and Wright returned to the plant, parked their car in the parking lot, and began to distribute literature to employees who entered the lot (R. 16; 92-93, 114-115). The guard promptly forbade the distribution and threatened to remove them forcibly from the lot if they per-

sisted (R. 16; 93, 115-116). They left peaceably and returned to the highway intersection (R. 16-17; 94-95, 116). Of the 5 or 6 cars that passed them thereafter, only one stopped (R. 17; 95, 117). That afternoon they returned again to the intersection as the shift was changing. Of the 25 cars that left the plant, 3 stopped; of the 6 or 9 that entered the plant, none stopped (R. 17; 95-96, 118-119).

The Union made no further attempt to distribute literature at the plant gate, on the parking lot, or at the intersection of the company road and the highway (R. 17; 97, 120).

II

The Board's conclusions of law

The Board, dividing 4 to 1 and adopting the conclusions of the Trial Examiner, found that the distribution of union literature at the intersection of the company road and the highway was virtually impossible and at times hazardous, that it was also virtually impossible to distribute literature off company premises, that there were no special circumstances which justified the respondent's rule insofar as it prohibited the distribution of union literature on its parking lot, and that under the circumstances of this case, the application of the rule to bar such distribution constituted an unreasonable impediment to the freedom of communication in the exercise by its employees of their rights to self-organization (R. 26, 34-35). The Board held that respondent, by enforcing its rule to forbid the distribution of union litera-

ture on its parking lot, violated Section 8 (a) (1) of the Act.⁶

III

The Board's order

The Board's order requires respondent to cease and desist from enforcing its rule prohibiting the distribution of union literature on its parking lot during the employees' nonworking time, and from engaging in any like or related acts or conduct which interfere with organizational rights guaranteed by the Act. Affirmatively, the Board ordered respondent to rescind immediately its rule prohibiting the distribution of union literature on the parking lot during nonworking time, to post appropriate notices, and to notify the Regional Director of the Board what steps it has taken to comply with the order (R. 36-38).

ARGUMENT

The Board properly found that respondent's refusal to permit the distribution of union literature on its parking lot to employees on their nonworking time violated Section 8 (a) (1) of the Act

We submit that this case is controlled by *N. L. R. B. v. LeTourneau Co.*, 324 U. S. 793, 796-797, 801-803, followed in *N. L. R. B. v. Caldwell Furniture Co.*, 199 F. 2d 267 (C. A. 4), certiorari denied, 345 U. S. 957;

⁶ Member Beeson dissented on the ground that distribution by other means "was *not virtually impossible*" since the Union could distribute literature at the stop sign, could appeal to the sheriff to enforce the law, and could reach some of the employees in Soda Springs (R. 38-46, emphasis in original). The dissent also adverts to several reasons why the employer could justifiably prohibit distribution at the main gate, a matter which we submit is not in issue here.

N. L. R. B. v. Carolina Mills, Inc., 190 F. 2d 675 (C. A. 4); *N. L. R. B. v. Monarch Machine Tool Co.*, 210 F. 2d 183, 184-187 (C. A. 6), certiorari denied, 347 U. S. 967, and cases there cited. These cases hold that, at least where effective alternative means of disseminating literature are not readily available, an employer cannot lawfully prohibit the distribution of union literature to employees on his parking lot outside working hours.

Respondent, necessarily accepting the principle of law just stated, argues for a contrary result here, claiming that the facts of this case establish that the Union had effective alternative means of distributing its literature. We show below that the record as a whole, particularly when read in the light of the facts existing in the *LeTourneau* and other cases cited above, supports the Board's finding that the Union had no such effective alternative.

The Supreme Court's description of the *LeTourneau* property discloses the close parallel between that case and this. The Court stated, 324 U. S. at 797:

The plant is bisected by one public road and built along another. There is 100 feet of company-owned land for parking or other use between the highways and the employee entrances to the fenced enclosures where the work is done, so that contact on public ways or on non-company property with employees at or about the establishment is limited to those employees, less than 800 out of 2,100, who are likely to walk across the public highway near the plant on their way to work, or to those employees who will stop their private automobiles, buses or

other conveyances on the public roads for communications. The employees' dwellings are widely scattered. (Emphasis supplied.)

With immaterial changes for detail, the above quotation could be a description of the situation involved in the instant case. Here, although some of the employees live in the nearby village, the dwellings of 1 out of 3 are widely scattered. Here, no employees walk to work, and none take buses, and the Union's contact with employees off the company property is limited to those who would be willing to stop their cars on the company road or on the public highway upon approaching or after leaving the company parking lot. The *LeTourneau* holding appears to be squarely applicable here.

Respondent's contention that the Union could have distributed the literature at the intersection of the Company road and the main highway is in the teeth of the Board's finding, amply supported by the record, that distribution at that point was both hazardous and ineffective because the cars went by without stopping. In all the parking lot cases there is some point at which the cars leave the plant property and enter a public street, but the courts have consistently sustained the Board's findings that the hazards and ineffectiveness of distributing literature to moving vehicles renders such intersections an unacceptable alternative to the parking lot as a place of disseminating material. See, e. g., *Monarch* case, *supra*, enforcing 102 N. L. R. B. 1242 at 1249-1250; *Caldwell* case, *supra*, enforcing 97 N. L. R. B. 1501-1502, 1506. Indeed the Supreme Court itself made it clear in *Le-*

Tourneau that the possibility of distributing literature "to those employees who will stop their private automobiles * * * on the public roads for communications" did not justify an employer's rule prohibiting distribution on his parking lot. 324 U. S. at 797.

The record and the decided cases similarly support the Board's rejection of respondent's further contention that distribution of union literature could have been accomplished effectively on the streets of Soda Springs or by mail. The record shows that one-third of the employees do not live in the town, and that 15 percent of them live from 17 to 39 miles outside the community. Under these circumstances distribution on the city streets would have been at best a haphazard proposition, even assuming that the employees wore identifying insignia when in town.⁷ And distribution by mail presented no real alternative since the Union had no roster of employees and their addresses. (R. 25; 175-177). Moreover, the availability of such a roster would not lead to a different result; similar distribution was possible in the other "parking lot" cases, including the *Caldwell* and *Carolina* cases which involved plants of comparable size, but the courts did not regard the availability of the mails as justifying the employer in denying the Union a right to distribute literature on the parking lot. As the Board said in *LeTourneau*, 54 NLRB 1253, 1261, "It is no answer to suggest that other means of disseminating

⁷ Respondent furnished jackets to its employees with the word "Monsanto" emblazoned thereon, but there is no evidence as to the extent to which these jackets were worn in town (R. 25; 182).

union literature are not foreclosed.” Indeed in *Le-Tourneau* the Supreme Court observed that there was no evidence and no finding “that the plant’s physical location made solicitation away from company property ineffective to reach prospective union members” or that “union organization must proceed upon the employer’s premises or be seriously handicapped,” 324 U. S. at 798–799.⁸

Respondent’s other contentions require little discussion. The fact that the Union acted here through outside organizers rather than through employee members is an insubstantial distinction from *Le-Tourneau*, as the *Carolina* and *Caldwell* cases recognize. The rights protected—that of the employees “fully and freely to discuss and be informed” and the “correlative * * * right of the union, its members and officials * * * to discuss with and inform the employees * * *” (*Thomas v. Collins*, 323 U. S. 516, 533–534)—are not diminished by the circumstance

⁸ The Trial Examiner properly distinguished the Board decisions relied on by respondent, *Monolith Portland Cement Co.*, 94 N. L. R. B. 1358; *Mooreville Mills*, 99 N. L. R. B. 572; *Newport News Children’s Dress Co., Inc.*, 91 N. L. R. B. 1521; and *Colonial Shirt Co.*, 96 N. L. R. B. 711. These cases stand simply for the proposition that where the union can distribute its literature at the plant but off the employer’s property just as effectively and conveniently as it can do so on his property, an employer rule against distributing on his property does not constitute a serious impediment to the freedom of communication and is, therefore, permissible. As the Trial Examiner pointed out, the issue in the *Monolith* and *Colonial* cases was the distribution of literature *in the plant*; distribution on the parking lot, at least in *Monolith*, was permitted. In *Mooreville* and *Newport*, it appeared that unlike the instant case distribution near the prohibited area was effective and convenient.

that the union acted through officials who were no employees. And respondent's suggestion that employees passed through the plant gate between the laboratory and the main building carrying phosphorous, a combustible material, is wholly beside the mark, for we are here concerned with distribution on the parking lot, not at the main gate, and with distribution during change of shifts, not during working hours. Respondent's rule, held invalid by the Board, was not designed to cover only the distribution of literature in dangerous areas around the plant, or its distribution during working hours. On the contrary, it covered respondent's entire property and applied at all times during the day. Respondent refused to permit Phelan's distribution of literature on the ground that it was against company policy and on the ground that if the privilege of distribution were granted Phelan other labor organizations would want the same privilege; the refusal was not premised on any claim of hazardous conditions (R. 86).

We submit that the Board properly concluded that respondent's right to control the use of its private property should, in the circumstances of this case, and upon established precedent, accommodate itself to the exercise of its employees' right to self organization and that respondent by enforcing a rule forbidding the distribution of union literature on its parking lot on nonworking time, has engaged in conduct violative of Section 8 (a) (1) of the Act.

CONCLUSION

It is respectfully submitted that for the reasons set forth above the order of the Board is valid in all respects and should be enforced.

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National Labor Relations Board.

DECEMBER 1954.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or

may be established by agreement, law, or otherwise: * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such tran-

script a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14,472.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

VS.

MONSANTO CHEMICAL COMPANY,
SODA SPRINGS, IDAHO PLANT,
RESPONDENT.

PETITION TO ENFORCE ORDER OF
NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT COMPANY.

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United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14,472.

NATIONAL LABOR RELATIONS BOARD,
PETITIONER,

VS.

MONSANTO CHEMICAL COMPANY,
SODA SPRINGS, IDAHO PLANT,
RESPONDENT.

PETITION TO ENFORCE ORDER OF
NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT COMPANY.

STATEMENT OF THE CASE.

This case is before this Court upon the petition of the National Labor Relations Board, referred to herein as the Board, pursuant to Section 10 (e) of the Labor Management Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, et seq.), hereinafter called the Act, for enforcement of its order¹ issued against the Respondent, Mon-

¹ The decision and order of the Board are reported at 108 N.L.R.B. 151.

santo Chemical Company, Soda Springs, Idaho, on May 27, 1954. The Respondent Company challenges the order of the Board sought to be enforced by these proceedings as invalid, improper, and not binding upon Respondent.

The original action was brought under Section 10 (b)² of the Act based upon a charge filed by the International Association of Machinists, Local Lodge No. 1933, AFL, hereinafter referred to as the Union, against Respondent. The General Counsel of the Board thereafter issued a Complaint dated December 17, 1953, against Respondent, alleging that Respondent had engaged in certain unfair labor practices within the meaning of Section 8 (a) (1)³ of the Act (R. 1-4)⁴.

The Complaint alleged that at all times since on or about September 28, 1953, the Respondent has refused to permit the Union or its agents and representatives to distribute Union literature to employees of the Respondent's Soda Springs, Idaho, plant upon property of Respondent, including a parking lot, thereby imposing an unreasonable impediment to the freedom of communication essential to the exercise of its employees' right to self organization.

The Answer of Respondent to the Complaint, dated January 8, 1954, denied all allegations of the Complaint that Respondent had engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act (R. 4-5).

A hearing was held on the allegations set forth in the Complaint at Soda Springs, Idaho on January 20, 1954,

² "Sec. 10 (b). Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint * * *"

³ "Sec. 8 (a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 * * *

⁴ References to the printed Record will be designated "R".

before Trial Examiner Martin S. Bennett. Evidence adduced at the hearing set forth the fact that Respondent's plant is located about one mile from the town limits of Soda Springs, Idaho, a small rural community of about 2,000 inhabitants (R. 8-9). The plant is situated on approximately 500 acres of ground, partly fenced by a three- or four-strand, dilapidated barbed wire fence (R. 123-124-126). It has approximately 130 employees (R. 125).

Prior to attempts by the Union to distribute literature, the Company had in effect a plant rule as follows:

Petitions:

Circulating petitions or posting or distributing any literature on Company property without approval of the Plant Manager is prohibited. (R. 10; 137-139; 189)

There is no rule barring solicitation by employees for Union membership at any time, either during working or non-working time. The rule prohibiting distribution of Union literature on Company property has been uniformly enforced against all, but particularly with no anti-Union animus. Indeed, Union representatives testified as to friendly relations existing at all times between the Respondent Company and the Union (R. 10-11).

An integral part of the plant operating unit is the parking lot where Union representatives attempted to distribute their literature to plant employees. When Respondent Company officials pointed out the *No Distributing Rule* in effect, the Union representatives stationed themselves at the intersection of the Company Road and the State Highway. There they made effective distribution of literature to Respondent's employees with complete safety to themselves (R. 74-75; 160-161; 171-174). Other avenues of communication to Respondent's employees were available to Union representatives, but were not utilized by them (R. 121-122).

On February 15, 1954, the Trial Examiner issued his Intermediate Report, finding that by denying the use of its parking lot for the distribution of Union literature during the nonworking time of its employees, Respondent had engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act (R. 6-31).

On March 9, 1954, in accordance with the provisions of Section 102.46 of the Rules and Regulations of the Board Series 6, as amended, Respondent filed with the Board its exceptions to the Trial Examiner's Intermediate Report and a brief in support thereof (R. 32-35).

The Board entered its final Order herein on May 27, 1954 adopting the Trial Examiner's findings, conclusions and recommendations insofar as they were consistent with the findings and conclusions of the Board. The Board found, as did the Trial Examiner, that the Respondent had engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

The Board's Decision and Order was not unanimous. Member Beeson dissented. He found that the record failed to establish that this case came within the narrow exception of the *LeTourneau*⁵ case, it being clear that it was not virtually impossible or hazardous for the Union to distribute its literature to the employees and, in view of the fact that such use of the Respondent's property by the Union would result in interference with business operations and undue hardship, he found that the Respondent did not violate Section 8 (a) (1) of the Act, and would therefore, have dismissed the Complaint (R. 38-46).

⁵ N.L.R.B. v. LeTourneau Company of Georgia, 324 U.S. 793.

POINTS AND AUTHORITIES.

I.

THE BOARD ERRED IN FINDING THAT THERE ARE NO SPECIAL CIRCUMSTANCES WHICH JUSTIFY THE NECESSITY OF RESPONDENT'S RULE INSOFAR AS IT PROHIBITS THE DISTRIBUTION OF UNION LITERATURE ON ITS PARKING LOT.

Boeing Airplane Co. v. N.L.R.B. F. 2d
(C.A. 9);

Goodyear Aircraft Corp., 57 N.L.R.B. 502;

North American Aviation, Inc., 56 N.L.R.B. 959;

Tabin-Picker & Co., 50 N.L.R.B. 928.

II.

THE BOARD ERRED IN FINDING THAT THE DISTRIBUTION OF UNION LITERATURE TO EMPLOYEES OFF OF RESPONDENT'S PROPERTY IS VIRTUALLY IMPOSSIBLE, AT TIMES HAZARDOUS, AND THAT IT CANNOT BE READILY CONDUCTED.

N.L.R.B. v. Haddock-Engineers, Ltd., 215 F.2d 734
(C.A. 9);

Ranco, Inc., 109 N.L.R.B. 149.

III.

THE BOARD ERRED IN FINDING THAT THE DECISION IN N.L.R.B. v. LETOURNEAU COMPANY OF GEORGIA, 324 U.S. 793, IS DISPOSITIVE OF THE PRESENT ISSUE.

Newport News Childrens Dress Co., Inc., 91
N.L.R.B 1521;

N.L.R.B. v. Mooresville Mills, 204 F. 2d 87 (C.A. 4);

N.L.R.B. v. LeTourneau Company of Georgia, 324
U.S. 793;

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474,
490.

ARGUMENT.

I.

THE BOARD ERRED IN HOLDING THAT THERE ARE NO SPECIAL CIRCUMSTANCES WHICH JUSTIFY THE NECESSITY OF RESPONDENT'S RULE INsofar AS IT PROHIBITS THE DISTRIBUTION OF UNION LITERATURE ON ITS PARKING LOT.

Prior to any organizational attempts by the Union to distribute literature to employees on the premises of the Plant, the Company promulgated certain rules and regulations by which the Plant would be governed. These rules were printed in a bound volume, entitled *Practices and Policies Manual*, and distributed to all employees (R. 137-140; 189). These regulations were in effect even before they were printed and distributed in August, 1953 (R. 138-139). Included in the regulations inter alia was the following:

Petitions:

Circulating petitions or posting or distributing any literature on Company property without approval of the Plant Manager is prohibited. (R. 189)

It is conceded by the Trial Examiner that the Company does not bar solicitation for Union membership by employees on Company property. The rule forbidding distribution of Union or other literature on Company property has been uniformly enforced against local businesses and organizations, as well as employees, on a *non-discriminatory* basis (R. 10, 11).

The Board held in at least two cases such a rule as before us did not offend the Act, if enforced on a non-discriminatory basis, as it was in the instant case and so admitted by Petitioner. In the one case, *North American Aviation, Inc.*, 56 N.L.R.B. 959, the Board held:

“Rule prohibiting distribution of literature or written or printed matter of any description on Company premises is not violative of NLRA; promulgation of such rule by employer does not constitute interference where it is not shown that rule has been *discriminatorily** enforced.”

and in the other, *Tabin-Picker and Co.*, 50 N.L.R.B. 928:

“Discharge of most active Union members for distributing Union handbills in plant announcing an open Union meeting was not *discriminatory** inasmuch as, in the interest of keeping plant clean and orderly, it is not unreasonable for an employer to prohibit distribution of literature on plant premises at all times and such restriction had not been *discriminatorily** enforced.”

The Board in the instant case erroneously found that the parking lot was not part of the Plant operating area. This finding is wholly contrary to the sworn and uncontradicted testimony of Witness Whiteside, *infra*. Indeed, it is necessary in order to maintain efficient and continuous operation that it *remain* as an integral segment of the operating unit. To reason otherwise would be to unlawfully burden the Company with reduced operating efficiency and needlessly expose third persons to the possibility of injury (R. 136-137; 141-145). Under these circumstances, the Company was warranted and compelled to adopt the Regulation now in controversy.

* Emphasis added.

The Plant is situate on 500 acres of land in a somewhat desolate and uninhabited area (R. 193-194—Respondent's Exhibits 4 and 5). The Plant site is partly fenced by a farm-type or rural-boundary-line fence, strung with three or four strands of barbed wire on dilapidated posts. This fence was on the tract when purchased by the Company. The Plant operating unit is only partly fenced. There is no fence surrounding the rear of the property or the north side of the Plant. There is no fence on two sides of the parking lot (R. 123-124; 126; 130).

In particular, the Court's attention is drawn to Respondent's Exhibit 5 (R. 194). This photograph, properly admitted into evidence, shows more clearly than words the untenable nature of the Board's claim that the area in which cars are now parked is not an integral part of the operating unit. An examination of the photograph reveals the parking area in close proximity to the electric furnaces which produce the combustible phosphorus. The photograph clearly reveals, to the near view of the viewer, the absence of any fence. The same examination reveals, in the middle right of the photograph and adjoining the parking area, the coke stock, which is a raw material (R. 124). To the middle left, a gate is shown, composed of wooden logs, clearly visible in the photograph. This represents an artistic endeavor, rather than a gate. The parking lot, the coke, the furnaces, and even the laboratory and office building clearly on the left, are so merged together in the photograph, as they are in fact, that it is indisputable that the parking area and the Plant operating unit are indivisible.

The Trial Examiner found that: "... despite the testimony of Plant Manager Whiteside to the contrary, ... the record will not support a finding that this parking area was part of the plant 'operating unit' ". His decision undeniably was reached ipse dixit and by an arbitrary refusal to accept the sworn and uncontradicted testimony of

Witness J. L. Whiteside, the Plant Manager (R. 11). Such an authority as *Corpus Juris Secundum* reveals that:⁶

“Uncontradicted or undisputed evidence should ordinarily be taken as true. More precisely, evidence which is not contradicted by positive testimony or circumstances, and is not inherently improbable, incredible, or unreasonable, cannot be arbitrarily or capriciously discredited, disregarded, or rejected,⁷ even though the witness is a party or interested; and, unless shown to be untrustworthy, is to be taken as conclusive, and binding on the triers of fact; and where the evidence tends to establish a fact which it is within the power and to the interest of the opposing party to disprove, if false, his failure to attempt to disprove it strengthens the probative force of the evidence tending to prove it.”

A close examination of the uncontradicted testimony of Mr. Whiteside, arbitrarily rejected by the Trial Examiner, shows conclusively that the parking area and the gate *was and is a part of the Plant operation and within the Plant proper.*

Q. (By Mr. French): *Do you consider, Mr. Whiteside, the parking lot to be within or without the plant proper?**

A. *I consider it within.**

Q. Is that a permanent parking lot?

A. No, Sir. (R. 132)

Q. (By Mr. French): Mr. Whiteside, is this same gate used at any other time by employees for any other purpose?

A. Yes.

⁶ 32 C.J.S. Evidence Sec. 1038 et seq.

⁷ *Ariasi v. Orient Ins. Co.*, 50 F. 2d 548.

* Emphasis added.

Q. What do they use it for?

A. The building marked "I" on this exhibit is the service building, the main office, the laboratory and the watchman's and because of the multiple installations in their building there is a continuous stream of incoming and outgoing traffic in the course of a 24-hour period in the normal conduct of business.

Q. Would employees on duty have any occasion to use that gate?

A. Oh, yes.

Q. What do they use it for?

A. An employee on duty might use that gate to come to the first aid room. He might use that gate to come to the personnel office. He might use it to come to his locker. He might use it to bring a sample to the laboratory.

Q. What kind of sample would he bring to the laboratory?

A. He might bring a sample of slag from the furnace. He might bring a sample of water that would be contaminated with acid. He might bring a sample of phosphorus. There are, in addition to these samples, other employees who move from a sample preparation room located inside the plant area back and forth to the laboratory preparing samples and taking theirs back to the laboratory for analysis.

Q. The sample of phosphorus that you refer to is the same phosphorus that you have spoken of previously?

A. Yes, Sir.

Q. It is live phosphorus?

A. Oh, yes.

- Q. *Mr. Whiteside, do those employees on duty, passing through this gate, do they pass through this gate during the whole span of the operation or are they limited to a certain particular hour? Do you understand the question?**
- A. *They might use that gate during any of a 24-hour period.**
- Q. *Would you say that gate, in addition to providing egress and ingress for employees, for employees changing shifts, is also a business operation gate?**
- A. *Oh, yes.**
- Q. (By Trial Examiner Bennett): It is the only gate that employees use, is that correct?
- A. Yes could say that almost a hundred per cent, yes.
(R. 136-137)

Since the testimony of Mr. Whiteside must be given its true probative value,⁸ then ipso facto not only is the gate and parking lot "within the plant proper," but the special circumstances surrounding this area would of sheer operational necessity make it obligatory to prohibit, by Company regulation, the distribution of *any literature* where such action by an individual may be hazardous and dangerous to his person because of proximity to the furnaces. The very nature of the operation of the plant makes it mandatory to preclude unauthorized persons not familiar with the plant operations to freely gain access to the operating area of the Plant. The Company does not desire nor is it required to accept liability for harm that might befall to unauthorized persons seeking freedom of transgression to the Plant area. To permit free and ready trespass to the

* Emphasis added.

⁸ See 32 C.J.S. Evidence, Sec. 1038, *supra*.

Plant area would indeed be imposing an unconscionable burden upon the Company not required by any State or Federal statute.

In the case of *Goodyear Aircraft Corp.*, 57 N.L.R.B. 502, the Board held:

“An employer may, *in the absence of exceptional circumstances*,* prohibit distribution of literature at all times within his plant where production is being carried on in order to protect his legitimate interest in maintaining plant cleanliness, (In re Tabin-Picker and Co., 50 N.L.R.B. 928, 12 LRRM 751, 12 LRRM 244; In re North American Aviation, Inc., 56 N.L.R.B. 959, 14 LRRM 172) and is justified in discharging employees for violation of such rule. We find that the respondent did not adopt its no distribution rule for the purpose of discouraging union organization or for any other objective proscribed by the Act, * * * * and did not enforce such rule in a *discriminatory** manner within the meaning of the Act.”

Considering *all the testimony* of Witness Whiteside and the lack of testimony to the contrary, no other result can be reached but that the gate and parking area are within the Plant proper and synonymous with production; and that these special circumstances made necessary the adoption of the *No Distributing Rule*.⁹

* Emphasis added.

⁹ This Court (C.A. 9) in *Boeing Airplane Company v. N.L.R.B.*, F. 2d, and cases cited therein found that special circumstances existed as a legal basis for the rules the company adopted. Although the factual aspects are distinguishable from the instant case, the Court's position in not applying the *Republic Aviation Corp.* rule (324 U.S. 793) can also for the same reason be applied here; to-wit: a finding of special circumstances.

II

THE BOARD ERRED IN FINDING THAT THE DISTRIBUTION OF UNION LITERATURE TO EMPLOYEES OFF OF RESPONDENT'S PROPERTY IS VIRTUALLY IMPOSSIBLE, AT TIMES HAZARDOUS, AND THAT IT CANNOT BE READILY CONDUCTED.

A close examination of the evidence will reveal that literature *was* effectively distributed to Company personnel at the highway intersection¹⁰ (in spite of consistently poor distribution timing by Union organizers Phelan and Wright).¹¹ On one occasion (4:00 P.M. January 23, 1953) as 25 cars left the Plant all but one car stopped to take the Union literature.

Q. (Mr. Bruckner): About how many cars left the plant at that time, if you can recall?

A. (Mr. Phelan): Well, around 25; perhaps a few more or less.

Q. Did any of them stop?

A. All but one.

Q. And they took literature, did they?

A. Yes, they all took literature after they stopped. (R 75)

Union representatives positioned themselves at or near the stop sign, near the intersection of the Company Road and the State Highway, on 7 different occasions in order to distribute literature. On all but 2 occasions, occupants of cars stopped to take literature.

¹⁰ The Trial Examiner arbitrarily and capriciously ruled that distribution was ineffectual away from the plant without sufficient evidence or factual support to sustain such ruling. See *N.L.R.B. v. Haddock-Engineers, Ltd.*, 215 F. 2d 734 (C.A. 9).

¹¹ Respondent's Exhibit No. 6 (R. 195) reveals that at no time did Union representatives Phelan and Wright so position themselves at the intersection of the Company Road and the State Highway when the greatest number of the employees leaving and entering the plant could have been contacted.

Arguendo, is it necessary in order to have effectual distribution of Union literature that there be 100% distribution—75%—50%? What criterion does the Board use? A fortiori, is there any compulsion on the part of the employees to accept the distribution of Union literature or any other literature at any place, at any time, under any circumstances? Some cars stopped; some did not. The employees, therefore, exercised their prerogative to accept or reject the literature, which right they had under Section 7¹² of the Act, notwithstanding their inherent constitutional right to reject.¹³

Despite testimony to the contrary the Trial Examiner, with reference to the number of cars that stopped to accept literature on the 1st of October, 1953, at around 8:30 A.M., found that no cars stopped. Mr. Thomas, Personnel Superintendent, testified that *some* cars did stop to receive literature.

Q. (Mr. French): Were you on duty at the plant, Mr. Thomas, on October 1, 1953?

A. (Mr. Thomas): I was.

Q. While on duty did you observe two men passing out literature at the stop sign?

A. I observed them in the afternoon of October 1.

Q. Did you see them in the morning?

A. Yes, I saw them in the morning, too.

* * * *

¹² "Sec. 7. Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection *and also shall have the right to refrain from any or all of such activities** except to the extent that such right may be affected by any agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3)."

* Emphasis added.

¹³ The Court of Appeals for the Sixth Circuit, in *G. W. Dickey, et al v. N.L.R.B.*, F. 2d, stated that "Section 7 * * * this is the basic provision of the Act."

Q. Did you see any cars stop and receive literature?

A. Yes, I saw some cars stop.

* * * *

Q. Later, that same day, October 1, did you also observe some men at the stop sign?

A. Yes, I did. I saw them in the afternoon. It was around 4 o'clock, 4:00 P.M., in the afternoon.

Q. And you saw them passing out literature at the stop sign?

A. I did.

Q. Some cars stopped for literature?

A. Some cars stopped. (R. 172-173)

An official State Highway stop sign is located at the juncture of Idaho State Highway 34 and the Company Road. The Company property ends at the stop sign (R. 188). The official State Highway stop sign requires a stop prior to entering the highway from the Company Road (R. 74). The Court is requested to take judicial notice of the Idaho Code in connection hereto.¹⁴ According to law, a driver is required to stop at stop signs (R. 100). In view of the testimony, there can be no question that there definitely is and was on the occasions mentioned, a force-

¹⁴ I.C.A. (1917) provides:

"40-201. *Designation of Through Highways.* The Commissioner of Public Works is hereby authorized to designate main traveled state highways as through highways.

"40-202. *Right of Way of Traffic.* The traffic on such through highways shall have the right of way over the traffic on any other highway, road or street intersecting therewith; provided, that at the intersection of two through highways the Commissioner of Public Works shall determine which traffic shall have the right of way.

"40-203. *Maintenance of Signs.—Full Stop.* The Commissioner of Public Works shall furnish, erect and maintain suitable standard signs on side roads or streets directing drivers of vehicles approaching a designated through highway to come to a full stop before entering or crossing such through highway, and whenever any such signs have been so erected and maintained, it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto."

ful, lawful and noticeable impediment to all automobiles leaving the Company premises. No one interfered with Union attempts to distribute literature at the stop sign (R. 103).

Witness Thomas testified that the confluence of the Company Road and State Highway was a safe place from which distribution of literature could have been and was effectively disseminated.

Q. (Mr. French): In your opinion, Mr. Thomas, looking at Respondent's Exhibit No. 4, is it your opinion that representatives of any organization can stand at the confluence of those two roads on either side with safety to themselves?

A. Yes, in my belief a person could stand there with safety on the side of the road by the stop sign.

Q. (Trial Examiner Bennett): On what is your answer based?

A. Upon observation of people standing out there.

* * * *

Q. The Examiner asked you, I believe, what people. Do you know what people?

A. Yes, I do.

Q. Would you state who they are for the records?

A. I have seen Mr. Phelan and Mr. Wright standing at this position on the plant road.

Q. You say they could stand there with safety. Do you mean there is room for automobiles to pass on either side of them or do you mean something else?

A. I mean they could stand on the side of the road with safety. (R. 160-161)

Respondent's Exhibit 4 reveals persuasive factors confirming the fact that the confluence of the Company Road

and the State Highway is a safe place from which Union representatives could and did effectively distribute their literature (R. 193). At no time during the day or night is there a significant number of cars or employees leaving or entering that they could not be effectively contacted by Union representatives (R. 189-191; 145-146). Respondent employs only a total of 130 people, a small number. They work on 3 shifts and at no time do more than 64 people leave or enter by the Company Road during any one hour; and, during most of the day, travel is non-existent.¹⁵ Testimony most favorable to the Petitioner, and, as reported by the Trial Examiner in his Report, indicated that:

On January 22, 1953, 6 to 8 cars entered and 6 to 8 cars left (R. 14). On January 23, 1953, 25 to 30 cars entered and 5 to 7 cars left at 8:00 A.M., and at 4:00 P.M. 25 cars left and 7 or 8 cars entered (R. 14). On February 9, 1953, 25 cars left, 7 or 8 cars entered (R. 14-15). On September 28, 1953, 5 cars left (R. 16). On October 1, 1953, 5 to 8 cars left and 6 to 9 cars entered (R. 17).

To find that this amount of traffic from and to the Plant during hourly periods was excessive and hazardous is patently absurd. Even at peak periods of traffic (when Phelan was never present) no danger existed, and at times, the Union representatives deliberately positioned themselves in the center of the road. It must be admitted that no compulsion existed for the Union representatives to so station themselves, but was voluntary. However, even from the center of the road, distribution was effectively made and no hazard existed.

¹⁵ See Respondent's Exhibit No. 7. This figure includes the cars of both hourly and salaried employees, many of whom ride together. However, according to Phelan's testimony, he was never present at any time between 7:00 and 8:00 A. M. in the morning on any of his distribution attempts. Nor was he ever present during a shift change when he could have reached the maximum number of employees.

The *LeTourneau* case was decided under the provisions of the NLRA (49 Stat. 449; U.S. Code Sup. II Title 29, Secs. 151-166), under which employees did not have the right to refrain from labor activities as *now* provided for in Section 7 of the Act. Quære, was it the intent of the Congress in giving employees the right to refrain from any and all of such activities under Section 7, to require that the employer shall hold them captive to accept literature¹⁶ from one or more organizers from a labor organization. Arguendo, how many labor organizers representing different unions may be on the site at one time? Soda Springs is a small plant of 130 employees. Within the realm of reason, there could be 130 representatives of different labor organizations on the property. This is what the Board has held in its decision in the instant case. By what tenuous reasoning can the Board find interference under Section 8 (a) (1) of the Act when employees voluntarily refuse to take or stop for literature?

The Act does not provide that non-employees shall have any of the rights guaranteed to employees under Section 7.¹⁷ Of significance is the Board's decision in *Ranco, Inc.*, 109 *N.L.R.B.* 149, wherein the Board states:

"However, when it comes to the exclusion of strangers from the plant premises the exercise of such privilege does not depend upon an employer being able to affirmatively prove that the rule is justified. Rather, as stated above, the affirmative burden rests upon the General Counsel to prove inaccessibility off the premises, and failing this the outside organizers have

¹⁶ Legislative History of the Labor Management Relations Act, 1947—Volume 1, page 616: "Eighteenth. The right to go to and from his work without being threatened or molested—Section 12 (a) (1)."

¹⁷ Legislative History of the Labor Management Relations Act, 1947—Volume 2, page 1198: "The National Labor Relations Act, which the pending Bill proposes to amend in Section 7, which the Bill does not touch, does not say anything about the rights of unions. It says that—employees shall have the right * * *."

no right, enforceable by this Board, to come on the employer's premises for organizing purposes."

In the instant case, the General Counsel utterly failed to prove inaccessibility. Failure to contact employees at their homes in person or by mail by the Union was due to the fact that the Union had no roster of employees. The General Counsel adduced no evidence that the Union had ever inquired either to the Company or through employees (R. 22; 175-177) as to a roster or as to employee identities.

Further, many avenues of communication with the employees were not utilized and what attempts that were made by the Union were few, incomplete and desultory (R. 121, 122).

There is an apparent lack of unanimity in the Board's findings relative to the application of the *No Distributing Rule*. The same absence of unanimity is apparent in applying the *LeTourneau* doctrine, if it applies at all, even though the Board says the doctrine is still valid. This view is exemplified by the majority opinion of Members Murdock and Rodgers, the concurring opinion of Chairman Farmer and Member Peterson and the dissenting opinion of Member Beeson in the *Ranco* case, *supra*; decided subsequent to the instant case.

Overwhelming testimony in the instant case proved that the distribution of Union literature to employees off of Company property is *not only possible and not hazardous*, but by testimony of the Union representatives themselves, a safe and effective method of contacting and reaching employees (R. 74).

III

THE BOARD ERRED IN FINDING THAT THE DECISION IN *N.L.R.B. v. LeTOURNEAU COMPANY OF GEORGIA*, 324 U.S. 793 IS DISPOSITIVE OF THE PRESENT ISSUE.

The United States Supreme Court decided, in *N.L.R.B. v. LeTourneau Company of Georgia*, 324 U.S. 793, that the

employer failed to show unusual conditions or special circumstances to exist in labor relations, plant location or otherwise to justify application of a plant rule against distribution of literature. Also the Court held that the plant *No Distributing Rule* was *discriminatory** against union activity because union employee members were fired for violation of the rule and this action thus discouraged membership in labor organizations. Furthermore, certain plant physical factors and the large number of employees played an important role in the Court's deliberation and subsequent decision.

Supporting Respondent's position are two cases that are authority for the proposition that a ban on distribution of all literature does not constitute a violation of the Act. In both cases, the facts are analogous.

In *N.L.R.B. v. Mooresville Mills*, 204 F. 2d 87 (C.A. 4), the Court stated:

"Employer did not engage in interference by prohibiting Union organizer from distributing Union literature . . . that the ban on distribution of literature did not constitute a 'serious impediment to the freedom of communication' within the meaning of the *Le-Tourneau* case."*

In *In Re Newport News Children's Dress Company, Inc.*, 91 N.L.R.B. 1521, the Board stated:

"It has been well settled since our decision in *Le-Tourneau Company of Georgia*, cited by the General Counsel, that under some circumstances an employer may not prohibit the distribution of Union literature on his property As it appeared in that case that the rule did cause such a serious impediment to self-

* Emphasis added.

organization, the Respondent was found to have violated Section 8 (1) of the Act. *But the facts of the LeTourneau case, and similar cases on which General Counsel relies are markedly different from those in the present case.**

Again, a close analogy with the present case. The fact that the employees in the instant case manifested disinterest does not derogate from the effectiveness of contact off of Respondent's premises.

The inapplicability of the first portion of the basis for the Court decision in *LeTourneau* to the instant case, "failure to show unusual conditions or special circumstances to justify application of *No Distributing Rule*," has been adequately covered in Point I, *supra*.

The Supreme Court, as a second basis for its decision in the *LeTourneau* case, decided that because of the discriminatory attitude of the Company in enforcing the *No Distributing Rule* by firing two employees who distributed the literature, that, therefore, freedom of communication was impaired under the Act. Does this second test (or standard) apply in the instant case? The discriminatory basis of enforcing the *No Distributing Rule* was controlling and determinative of the result obtained by the Board in *Goodyear Aircraft Corp.*, 57 N.L.R.B. 502, *North American Aviation, Inc.*, 56 N.L.R.B. 959, and in *Tabin-Picker & Co.*, 50 N.L.R.B. 928, *supra*. Here the application fails completely. Nowhere did the General Counsel show discrimination, Union animosity, or a rule against Union solicitation by employees. On the contrary, it was admitted that the rule was uniformly enforced. No Union animosity. Relations were always of the very best, and there was no rule barring solicitation (R. 10-11; 89).

The Trial Examiner found (which view was adopted by the Board) that the decision in *LeTourneau* is dispositive

* Emphasis added.

of the present issue and that the facts in the *LeTourneau* case were substantially identical with those present herein. Moreover, the Examiner reached the specious conclusion that the difference in the number of employees was of *no substance* (R. 20). A close examination of the *LeTourneau* case reveals that the Trial Examiner did not examine the facts upon which the Supreme Court based its decision. To conclude that the facts are identical or that the difference is of no substance is incredible. It manifests a definite apathy on the part of the Examiner to find antithetic facts.

The Court stated, 324 U.S. 797:

“The Company’s (LeTourneau) plant for the manufacture of earth moving equipment and other products for the war is in the country on a six thousand acre tract. The plant is bisected by one public road and built along another. There is one hundred feet of company-owned land for parking or other use between the highways and where the work is done, so that contact on public ways or on non-company property with employees at or about the establishment is limited to those employees, less than 800 out of 2100, who are likely to walk across the public highway near the plant on their way to work, or to those employees who will stop their private automobiles, busses or other conveyances on the public roads for communications. The employees’ dwellings are widely scattered.”

A comparison of the facts in the *LeTourneau* case which the Trial Examiner and the Board find are substantially identical, and in the instant case are as follows:

- (1) Soda Springs plant 500 acres—LeTourneau plant 6000 acres.
- (2) Soda Springs 130 employees—LeTourneau plant had 2100 employees.
- (3) LeTourneau employees dissipated by auto, busses, and other conveyances to dwellings widely

scattered; Soda Springs employees all leave by auto to dwellings of which 67.6% or 88 out of 130 employees are located in Soda Springs, Idaho, a community of 2000 people, one mile away. 23 employees live within a 12-mile radius, and the remaining 19 employees live 17 to 39 miles from the plant (R. 189-191).

(4) LeTourneau plant bisected by heavily traveled highway—Soda Springs plant has one company road converging on a state highway, both infrequently traveled.

Referring again to the *LeTourneau* case, the Trial Examiner stated that:

“The only difference would be in the number of personnel to be reached and the greater amount of distribution required but not in the difficulty of distributing as such.” (R. 20)

What greater distinction could have been presented but such a vast and critical difference in the number of personnel? What is more elementary and determinative in law than the distinguishability of facts? There was no showing in the *LeTourneau* case that the parking lot was used in conjunction with plant operations as in the instant case.

The Trial Examiner's Report states:

“If the criteria behind the *LeTourneau* are still valid, namely the *virtual impossibility*”^{*} of distributing literature off employer premises, they would be equally applicable irrespective of the size of the employer or the number of employees involved (R. 20).

Webster's Collegiate Dictionary¹⁸ defines *virtual* as “being in essence or effect, but not in fact”; and defines *impossibility* as being “not possible, incapable of being or

* Emphasis added.

¹⁸ Webster's Collegiate Dictionary, Fifth Edition, 1948.

occurring".¹⁹ There is substantial evidence on the record as a whole in this case to preclude the application of the term "impossible". The Supreme Court, we are certain, did not envision applying the decision in the *LeTourneau* case to this case. Were the facts of the present case before the Supreme Court today, the Court, we believe, would not apply the *LeTourneau* decision as determinative or analagous to the issues herein presented.

To support his position the Trial Examiner refers to two cases, he states:

"Also supporting the position of the General Counsel are two cases whose facts are almost identical with those in the present case. *N.L.R.B. v. Carolina Mills, Inc.*, supra, and *N.L.R.B. v. Caldwell Furniture Company*, 199 F. 2d 267 (C.A. 4) Cert den 345 U.S. 907. In those cases, the Court of Appeals enforced Board orders setting aside company rules forbidding the distribution of Union literature by Union representatives in a Company parking lot and at a Company gate, respectively, in effect following the *LeTourneau* decision." (R. 18-19)

The facts in the *Caldwell Furniture Company* case can be distinguished from the issues here to negate the applicability of the decision. The *Caldwell Furniture Company* employed over 450 workers and the plant was a mile and a half from town. The plant buildings and lumber yard were *completely fenced*. *No production* carried on outside the fenced area. The Court held, 199 F. 2d 267:

"Distribution of literature to employees off the Respondent's property is *virtually impossible and, at times hazardous*."*

¹⁹ 2 ALR 1220.

* Emphasis added.

Again, use of the criteria "virtually impossible" and "hazardous" appear as being determinative of the issues. Again Respondent has proved that these terms, upon which the *Caldwell Furniture Company* case was decided, do not apply to the present case.

In the *Carolina Mills* case, 190 F. 2d 675:

"The Union representatives were prohibited from distributing Union literature at the main entrance door to the Plant where the employees were changing shifts and at the entrance to the parking lot * * * *The employer offered no evidence of any rule prohibiting the distribution of literature on its property** and in fact permitted such distribution on the parking lot shortly after its interference with the Union."

What are the relevant facts in the *Carolina Mills* case that are applicable to the instant case? Respondent contends there are none and that the case is distinguishable. The Union representatives in the *Carolina Mills* case were employees, and the plant did not have a rule barring distribution of literature. Soda Springs Plant *had in force, a No Distributing Rule*. The rule was uniformly enforced.

The *N.L.R.B. v. Monarch Machine Tool Company*, 210 F. 2d 183, case is also patently distinguishable on the facts alone. The plant was staffed by 1600-1650 hourly employees, 7/10 of a mile from a town having a population of approximately 12,000 inhabitants. The parking lot where the distribution was attempted was located west of the plant and *separated* therefrom by railroad tracks. The only ingress to the plant from the parking lot was by means of a pedestrian bridge leading from the east border of the parking lot, over the railroad tracks, to the west entrance of the plant. No contention was made that the parking lot was among other things a production area.

* Emphasis added.

Remington Rand, Inc., 103 N.L.R.B. 125; *Grand Central Aircraft Company*, 193 N.L.R.B. 101; *Glen Raven Silk Mills*, 101 N.L.R.B. 239 enf'd as modified 203 F. 2d 946 (C.A.4); *Carthage Fabrics Corp.*, 101 N.L.R.B. 541; and *George Noroian Company*, 101 N.L.R.B. 112, are cases cited by the Trial Examiner as important to the issues; however, Respondent contends that these cases are also distinguishable on the facts and do not apply, notwithstanding the fact they are distinguishable in the light of Beeson's dissent that the rule may not have been properly applied.

The Labor Management Relations Act²⁰ and Administrative Procedure Act²¹ make it clear that a reviewing court is not barred from setting aside a decision of National Labor Relations Board when it cannot conscientiously find that evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view.

In *Universal Camera Corporation v. N.L.R.B.*, 340 U.S. 474, 490, the Court stated:

"It is believed that the provision of the conference agreement relating to the court's reviewing power will be adequate to preclude such decisions as those in *N.L.R.B. v. Nevada Consolidated Copper Corporation* (316 U.S. 105 (10 LRRM 607)) and in the *Wilson, Columbia Products, Union Pacific States, Hearst, Republic Aviation, and LeTourneau*,* etc. cases, *supra*, without unduly burdening the courts.

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts

²⁰ 29 U.S.C. Section 160 (e).

²¹ 5 U.S.C. Section 1009 (e).

* Emphasis added.

must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect, but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both."

Furthermore, as pointed out by Board Member Beeson in the Board's decision:²²

The rule of *LeTourneau* case constitutes an exception to the fundamental doctrine that an employer has the right to control the use of his own property. As an exception, it should be strictly limited and not applied in the absence of the overriding considerations given effect by the Supreme Court in *LeTourneau*. So viewed, the *LeTourneau* case, in my opinion, is inapplicable here (R. 38-46).

²² Pending at this time are three other appeals in as many circuits, which appear to raise the same issue as presented in the instant case. These cases are *N.L.R.B. v. Ranco*, 109 N.L.R.B. 149 (C.A. 6); *N.L.R.B. v. Babcock & Wilcox*, 109 N.L.R.B. 82 (C.A. 5); and *N.L.R.B. v. Seamprufe*, 109 N.L.R.B. 2 (C.A. 10).

CONCLUSION.

The Respondent Company respectfully submits that, for the reasons stated, this Court should deny the petition of the Board for an Order of Enforcement and the Complaint should be dismissed in its entirety.

Respectfully submitted,

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Dated this 5th day of January, 1955.



No. 14,475

IN THE

United States Court of Appeals
For the Ninth Circuit

GERALD A. BROWN, Regional Director of
the Twentieth Region of the National
Labor Relations Board, for and on be-
half of The National Labor Relations
Board,

Appellant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a corporation, and BELL TELE-
PHONE COMPANY OF NEVADA, a corpo-
ration,

Appellees.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

BRIEF OF APPELLEES.

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Appellees.

Appeal from the United States District Court for the Northern
District of California, Southern Division.

BRIEF OF APPELLEES.

**STATEMENT OF JURISDICTION AND
THE STATUTE INVOLVED.**

Appellees, *THE PACIFIC TELEPHONE AND TELE-
GRAPH COMPANY* and *BELL TELEPHONE COM-
PANY OF NEVADA* (hereinafter jointly referred to as

the "Company" or the "Employer") agree with Appellant's statements of jurisdiction and of the statute involved.

STATEMENT OF THE CASE.

The Company does not agree with Appellant's statement of the case. Appellant's statement ignores the key factual considerations in this dispute, i.e., whether separate toll maintenance units are appropriate for collective bargaining purposes.

The Company's answer to the petition was not, as stated by Appellant, limited to "denying that any unfair labor practices had been committed because of its good faith belief that units of toll maintenance employees no longer were appropriate for collective bargaining purposes" (Appellant's Br., p. 4). The Company expressly denied that the claimed toll maintenance units "are or have been at any time since on or about May 29, 1953, appropriate for purposes of collective bargaining" (R. 38, 43).¹

Appellant's statement of the case omits the following material facts expressly found by the National Labor Relations Board:

1. The pattern of bargaining under the certifications of 1940, 1944 and 1949 "satisfied none of the parties" (R. 57).

2. The fourteen-, nine- and five-year-old unit determinations have "produced much bargaining strife, provoked the filing of many grievances and the making of many job classification studies, and caused

¹References to the printed Transcript of Record are designated "R."

considerable expense and inconvenience to the contracting parties” (R. 57-58).

3. “Within the past 10 years, steadily accelerated changes in the technology of the Employer’s communications and maintenance equipment; integrated ‘toll’ and ‘exchange’ developments in its telephone service to meet the rapid postwar increase of population on the West Coast; the introduction of new communications services with integrated dual ‘toll’ and ‘exchange’ components; the increase in the number and complexity of Federal and State regulations; and the integration of ‘toll’ and ‘exchange’ functions performed by the Employer’s telephone equipment operating and maintenance employees have produced a situation where today the words ‘toll’ and ‘exchange’ are no longer simple geographical definitions, but, on the contrary, complex geographical, economic, and legal concepts, easier to exemplify than to define, and developed for purposes unconnected with collective bargaining” (R. 59-61).

4. “Equipment which includes automatic switching devices, vacuum tube repeaters and carrier equipment, and tandem switching systems serve to obliterate the earlier ‘toll’ and ‘exchange’ distinctions by permitting ‘exchange’ calls over longer distances and by performing dual ‘toll’ and ‘exchange’ functions, frequently automatically” (R. 59).

5. “Today the Employer’s employees frequently work in groups on the Employer’s equipment in accordance with their knowledge of particular items of

equipment, rather than in accordance with any distinctive 'toll' or 'exchange' skills they may have. In the field of radio-telephone, for example, 'central office' employees, represented by the Intervenor, work on the mobile units, while both 'central office' employees, represented by the Intervenor and 'toll maintenance' employees, represented by the Petitioner, work on the stationary transmitters and receivers" (R. 60-61).

6. "Moreover, it now clearly appears that, however distinctive the skills of 'toll maintenance' and 'central office' employees may have been in early days of less developed operations, the present worth of the Employer's skilled telephone maintenance employees lies in their ability to handle highly complicated, technical, and integrated circuits and equipment however used, rather than in any special 'toll' or 'exchange' aptitudes, if any, that they may happen to possess" (R. 62-63).

7. "Although in the earlier cases [the certifications of 1940, 1944 and 1949] the Board noted that 'without special training, central office employees cannot perform toll maintenance work, and vice versa,' today, in view of the Employer's complex equipment, its telephone equipment maintenance employees are jointly trained on the basis of each item of equipment, rather than on the basis of any generalized 'toll' or 'exchange' concept thereof" (R. 63).

8. The system-wide unit of toll maintenance employees sought by ORTT (Order of Repeatermen and

Toll Testboardmen, the complaining union) was found inappropriate by the Board on March 17, 1954, because such a unit would "continue the very sort of unit indefiniteness, indefinability, and variability" which existed under the old certifications (R. 62).

These are facts found by the National Labor Relations Board on March 17, 1954 (R. 52-64), not in 1940, not in 1944, nor in 1949.

Appellant further omits from his statement of the case the fact that prior to recognition of Communications Workers of America, CIO, on April 27, 1954, as bargaining agent for employees in a unit of all plant craftsmen in the Company's Northern California and Nevada Area, including the toll maintenance employees in that area, the Company found by a check of its records that 78.9 per cent of the 7677 employees in that unit had selected CWA as their representative (R. 193).

QUESTIONS PRESENTED.

1. Did the District Court abuse its discretion in denying the interlocutory injunction?
2. Did the District Court properly conclude, on the basis of unrefuted findings of the Board made on March 17, 1954, that the present appropriateness for collective bargaining purposes of the claimed units had not been established?
3. In the absence of evidence that the claimed units are today appropriate, did the District Court properly hold that it was unable to find reasonable cause to believe

that Appellees violated an act which only required them to bargain with a union representing employees in an appropriate unit?

4. Whether or not the claimed units are appropriate, did the District Court properly hold that it was unable to find reasonable cause to believe that a violation of the Act has occurred in view of Appellees' good faith reliance upon findings made by the Board on March 17, 1954?

SUMMARY OF ARGUMENT.

In an appeal from a denial of an interlocutory injunction, the Appellant must demonstrate that there is no reasonable basis for the District Court's decision.

To establish even a *prima facie* case, Appellant had to offer evidence that the claim of the complaining union encompassed representation of employees in a unit presently appropriate for collective bargaining. As Appellant failed to do this, the record shows no basis on which he would be entitled to an injunction.

As the unrefuted evidence shows the claimed bargaining units are inappropriate for that purpose today, the District Court was not only reasonable in denying but was compelled to deny the interlocutory injunction.

When, as here, an employer reasonably relies on findings of the National Labor Relations Board in refusing to recognize a union as representative of employees in a unit which seems to be inappropriate, its refusal is not a violation of the Act.

By reason of the foregoing, there is no reasonable cause to believe that a violation of the National Labor Relations Act has occurred. The District Court properly denied the requested injunction and its judgment should be affirmed.

ARGUMENT.

1. IN AN APPEAL FROM A DENIAL OF AN INTERLOCUTORY INJUNCTION, THE APPELLANT MUST DEMONSTRATE THAT THERE IS NO REASONABLE BASIS FOR THE DISTRICT COURT'S DECISION.

The denial or granting of the injunction requested under section 10 of the National Labor Relations Act, as amended (hereinafter referred to as the "Act"),² depends on the reasonable exercise of the District Court's discretion.

In considering an injunction under section 10(1) of the Act, the court in *United Brotherhood of Carpenters, Etc. v. Sperry* (10 Cir. 1948) 170 F.2d 863, said (p. 869):

"It is not the inflexible duty of the court in every case of this kind to grant a temporary injunction to remain in force and effect until the Board makes its final adjudication of the charge of unfair labor practice. The court has a reasonable permissive range for the exercise of its discretion in the granting of injunctive relief appropriate to the particular circumstances presented, or in withholding its writ. *Hecht Company v. Bowles*, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754."

²29 U.S.C. 141 et seq.

The *Sperry* case is quoted and followed in *Le Baron v. Los Angeles Build. & Constr. Tr. Council* (S.D. Cal. 1949) 84 F.Supp. 629, affirmed (9 Cir. 1950) 185 F.2d 405.

In *Brown v. National Union of Marine Cooks and Stewards* (N.D.Cal. 1951) 104 F.Supp. 685, upon an application for an injunction under section 10(j) the court said (pp. 690-691):

“The injunction does not issue as a matter of course. When there is shown a sufficient factual basis, there is in the court a reasonable permissive range of discretion as to whether this relief will or will not be granted.”

On an appeal, therefore, from the exercise of such discretion “the Government must demonstrate that there was no reasonable basis for the District Judge’s decision” (*United States v. W. T. Grant Co.* (1953) 345 U.S. 629, 634).

The rule is well stated by this court in *Bankers’ Utilities Co. v. National Bank Supply Co.* (9 Cir. 1931) 53 F.2d 432, as follows (p. 433):

“By an application for a temporary injunction, the discretion of the court is appealed to, and, unless the showing presented on undisputed facts is such as to entitle the moving party as a matter of law to the writ sought, the decision of the trial judge may not be disturbed. That rule needs no citation of authorities to support it.”

See also *Bowles v. Huff* (9 Cir. 1944) 146 F.2d 428.

Unless, therefore, Appellant has demonstrated a lack of any reasonable basis in the record for the denial of the

injunction, and an abuse of discretion by the District Court, the judgment must be affirmed.

2. TO ESTABLISH EVEN A PRIMA FACIE CASE, APPELLANT HAD TO OFFER EVIDENCE THAT THE CLAIM OF THE COMPLAINING UNION ENCOMPASSED REPRESENTATION OF EMPLOYEES IN A UNIT PRESENTLY APPROPRIATE FOR COLLECTIVE BARGAINING. AS APPELLANT FAILED TO DO THIS, THE RECORD SHOWS NO BASIS ON WHICH HE WOULD BE ENTITLED TO AN INJUNCTION.

Appellant relies heavily on the fact that the Company's refusal to recognize the ORTT as a bargaining agent is undisputed. The Board has held, in dismissing a refusal-to-bargain charge, that the mere refusal by an employer of a union claim to recognition is not ipso facto a violation of the Act (*Walmac Co.* (1953) 106 NLRB No. 244, 33 LRRM 1019, 1020).

The National Labor Relations Act, as amended, provides that "It shall be an unfair labor practice for an employer * * * to refuse to bargain collectively with the representatives of his employees, *subject to the provisions of section 9(a)*"³ (29 U.S.C. 158(a)).

Section 9(a) of the Act provides: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees *in a unit appropriate for such purposes*, shall be the exclusive represent-

³Emphasis added unless otherwise indicated.

atives of all the employees in such unit * * *'' (29 U.S.C. 159(a)).

The Board has held in a situation analogous to the circumstances here that "it was necessary that the General Counsel, to establish his *prima facie* case, produce evidence that the representation claim of the [complaining union] did encompass employees *within an appropriate unit*. This the General Counsel failed to do. Accordingly, we shall dismiss the complaint * * *'' (*William Penn Broadcasting Company* (1951) 93 NLRB 1104, 1106, 27 LRRM 1532, 1533).

The only evidence offered by Appellant of the appropriateness of the toll maintenance units was three early certifications, one in California in 1940, one in Washington in 1944, and a third in Oregon in 1949.

There are many cases having to do with the effective duration of a certification, but the accepted rule is well stated in *National Labor Rel. Bd. v. Globe Automatic Sprinkler Co.* (3 Cir. 1952) 199 F.2d 64, after reviewing many Board and court cases, as follows (p. 69):

"In sum, it is apparent that the overwhelming weight of authority, expressed in decisions by the National Labor Relations Board and by the courts, is (1) that 'in the absence of unusual circumstances' a 'reasonable period' must elapse after the certification of the union before the employer can refuse to bargain with it; and (2) 'reasonable period' has been defined as 'customarily' or 'usually' for 'about one year'."

Thus the Board and the courts have been quick to find improper a refusal to bargain which violates the "one-year certification rule." Though the rule has no applica-

tion here, many of the principal cases relied upon by Appellant have to do with that rule.⁴

To span the fourteen, nine and five years since the certifications here, Appellant argues for a "presumption of continued appropriateness" (Appellant's Br., p. 17). Any such presumption was nullified by the Appellant's own evidence, the Board decision of March 17, 1954 (Pet. Exh. 19, R. 101, set out as Exh. B at R. 52-64).

Appellant does not and cannot question the fact that changing conditions affect the continuing validity of certifications (Appellant's Br., p. 19). In fact the Board stated in *Pacific Telephone and Telegraph Company* (1944) 58 NLRB 1042 (Appellant's Br., p. 6) at page 1048:

"We have frequently stated that what employees constitute an appropriate bargaining unit depends upon all the circumstances *existing at a given time.*"

⁴*Pittsburgh Glass Co. v. Board* (1941) 313 U.S. 146, Appellant's Br. pp. 17, 18 (refusal immediately after certification); *National Labor Relations Bd. v. Prudential Ins. Co.* (6 Cir. 1946) 154 F.2d 385, Appellant's Br., pp. 18, 19 (refusal within three and one-half months of certification); *Foreman & Clark, Inc. v. NLRB* (9 Cir. Jul. 30, 1954) F.2d 34 LRRM 2697, Appellant's Br., pp. 18, 19 (refusal five weeks after certification); *Packard Co. v. Labor Board* (1947) 330 U.S. 485, Appellant's Br., p. 18 (refusal immediately after certification); *Board v. Hearst Publications* (1944) 322 U.S. 111, Appellant's Br., p. 18 (refusal immediately after certification); *National L. Relations Board v. Appalachian E. Power Co.* (4 Cir. 1944) 140 F.2d 217, Appellant's Br., p. 19 (refusal less than ten weeks after certification); *Valley Mould & Iron Corp. v. National Labor R. Board* (7 Cir. 1940) 116 F.2d 760, Appellant's Br., p. 19 (refusal within three months of certification); *National Labor Relations Board v. S. H. Kress & Co.* (6 Cir. 1952) 194 F.2d 444, Appellant's Br., p. 19 (refusal immediately after certification); *National Labor Relations Board v. National Mineral Co.* (7 Cir. 1943) 134 F.2d 424, Appellant's Br., p. 19 (refusal immediately after certification).

In *Fruehauf Trailer Company* (1949) 87 NLRB 589, the Board said (p. 591):

“We do not agree with the Intervenor that, because of the long history of multi-plant bargaining, a separate unit is inappropriate. While we place great weight on collective bargaining history, we will not make it the determinative factor in deciding the unit issue where, as here, *new and significant changes in the Employer's organization and operations have occurred since the date of the Intervenor's certification which dictate a contrary result.*”

See also:

The Kroger Company (1950) 88 NLRB 243;
General Motors Corporation, Oldsmobile Division
 (1942) 45 NLRB 11, 14;
Jones & Laughlin Steel Corporation (1941) 37
 NLRB 366, 371.

Conceding that changed conditions may have sapped the vitality of these old certifications, Appellant argues that nevertheless the Company could not take “on itself first to disregard the existing certifications” (Appellant's Br., p. 19). He quotes the opinion of the Court of Appeals for the Sixth Circuit in *National Labor Relations Bd. v. Prudential Ins. Co.* (1946) 154 F.2d 385, 390 (Appellant's Br., pp. 19-20). The court said:

“Until such changed conditions are reflected by a later ruling of the Board * * * a valid existing certification must be honored.”

In that case a union was certified on February 5, 1943, and the challenged refusal to bargain occurred on May 25, 1943. As a defense the employer pleaded a later

Board decision, rendered on June 5, 1943, which questioned the propriety of the February certification. The court found two answers to this defense. First, the employer's alleged unlawful refusal occurred before the ruling relied upon. Second, the court held that the one-year certification rule should apply in any event.

Compare the facts in this record.

First, the Company's acts of which complaint is made occurred almost a month after the Board decision of March 17, 1954, and such action was taken in express reliance upon and only after careful study of that decision (R. 151-153, 172-174). Further, changed conditions were not only "reflected by a later ruling of the Board"⁵ but "steadily accelerated changes" in the Company's operations were expressly found by the Board in that decision (R. 59).

Second, the certifications were fourteen, nine and five years old. The one-year certification rule can have no application.

Appellant's contention that the Company "took it on itself to disregard the existing certifications"⁶ is not supported by the record. In May, 1953, the complaining union, dissatisfied with the old certifications (R. 57), chose to disregard them and petitioned for a new enlarged unit (R. 140). In March, 1954, the Board after a long hearing and careful investigation of the facts found that there had been such a change in conditions that the separation of

⁵*National Labor Relations Bd. v. Prudential Ins. Co.* (6 Cir. 1946) 154 F.2d 385, 390, *supra*, p. 12.

⁶Appellant's Br., p. 19.

toll maintenance employees from other telephone maintenance employees was no longer justified for collective bargaining purposes. The complaint now seems to be, not that the Company "took it on itself to disregard," but that the Company heeded the Board's expressed views.

It is the Appellant who (like the employer in the *Prudential Insurance* case, *supra*) relies on an after-the-fact opinion by the Board, i.e., the Board's supplemental decision of May 14, 1954 (R. 66-68). This unusual document was released not only after the Company's alleged unlawful acts but after the filing of the complaint before the Board in the case to which this proceeding is ancillary (R. 17-25). The intent and legal effect of the supplemental decision is not clear. Is it conceivable that the Board was repudiating its express findings of March 17, 1954, without the introduction of new evidence or without motion from either party? Further, the Company has voluntarily maintained the status quo regarding recognition of collective bargaining agents as of May 11, 1954, the date of the issuance of the complaint (R. 45).

The only succor the Appellant finds in the detailed opinion of March 17th is the statement that a new toll maintenance unit "will not at this time ensure to employees in the Employer's plant maintenance department any fuller freedom in exercising the rights guaranteed by the Act than they now enjoy" (Appellant's Br., pp. 8, 20). It will be noted that the reference is to rights of "employees in the Employer's *plant* maintenance department," not to rights of "toll maintenance employees" as a separate group. That the statement is an intentional reference to the over-all maintenance group appears clear.

from the fact that it immediately follows the holding that "it now clearly appears that, however distinctive the skills of 'toll maintenance' and 'central office' employees may have been in early days of less developed operations, the present worth of the Employer's skilled telephone maintenance employees lies in their ability to handle highly complicated, technical, and integrated circuits and equipment however used, rather than in any special 'toll' or 'exchange' aptitudes, if any, that they may happen to possess" (R. 62-63).

The statement relied upon by Appellant is an express recognition by the Board that the right to bargain collectively as an appropriate unit is vested today in the plant maintenance employees as a group without regard to "any special 'toll' or 'exchange' aptitudes" which individual employees may have.

There is, thus, nothing in this record to support the contention, based solely on a completely rebutted and nullified presumption, that there "exists reasonable cause to believe that the existing [sic] units of toll maintenance employees continue to be appropriate" (Appellant's Br., p. 22). The Appellant, petitioner below, failed to establish any basis on which he would be entitled to an injunction.

3. AS THE UNREFUTED EVIDENCE SHOWS THE CLAIMED BARGAINING UNITS ARE INAPPROPRIATE FOR THAT PURPOSE TODAY, THE DISTRICT COURT WAS NOT ONLY REASONABLE IN DENYING BUT WAS COMPELLED TO DENY THE INTERLOCUTORY INJUNCTION.

In contrast to the absence of any showing by Appellant that the old units are today appropriate, the record affirmatively demonstrates that the units as previously certified are today singularly inappropriate.

The findings of the Board in its decision of March 17 1954, together with the Company's brief in the litigation (R. 65), point out the legally fatal defects of separate toll maintenance units as applied to today's operations. The units claimed are not industrial. They are not departmental. They are not geographical. They do not meet any of the standards established by the Board for craft units or for units with a craft nucleus.

See:

New York Telephone Company (1952) 100 NLRB 1374;

Milprint, Inc. (1950) 90 NLRB 98;

General Electric Company (1950) 89 NLRB 726;

Teletype Corporation (1948) 79 NLRB 1044.

The "indefiniteness, indefinability, and variability" inherent in these units, as found by the Board (R. 62), alone make them inappropriate (*Reilly Electrotape Company* (1951) 94 NLRB 810).

The units do not meet any of the presently established standards of appropriateness. Nowhere in his brief does Appellant contend that they do. He argues nevertheless that "the Board will again find the ORTT units appro

priate" because of "the long history of established bargaining relationship" (Appellant's Br., p. 23). This argument is in direct contravention of the holding of the Board in *Fruehauf Trailer Company* (1949) 87 NLRB 589, supra, and in *The Kroger Company* (1950) 88 NLRB 243, supra. In the latter case the Board said (p. 244):

"Although we place great weight on collective bargaining history, we will not make it the determinative factor in deciding the unit issue where, as here, since the date of the Intervenor's 1944 certification, a sufficiently significant change in the Employer's organization has occurred to dictate a different result. * * * bargaining history developed under conditions not now prevailing is not controlling * * *."

Further, the Board has given weight to bargaining history only where the pattern of bargaining has been found satisfactory to the parties. After considering the years of strife over the unit question, the Board found in its March 17th decision in case 20-RC-2251 on the petition of the ORTT for an enlarged toll maintenance unit that (R. 57):

"The record is clear that this present pattern [of collective bargaining under the old certifications] satisfied none of the parties to this proceeding."

Thus neither the facts nor the law supports the Appellant's argument that there is reason to believe the Board will hold the old units appropriate under today's admittedly changed conditions.⁷ A study of the record and

⁷The further argument by Appellant based on *Consolidated Vultee Aircraft Corporation* (1952) 101 NLRB 584 (Appellant's Br., pp. 22-23) that whether toll maintenance employees should

a review of the law show that the conclusion of the District Court to the contrary was not only reasonable but the only proper conclusion under the circumstances.

4. **WHEN, AS HERE, AN EMPLOYER REASONABLY RELIES ON FINDINGS OF THE NATIONAL LABOR RELATIONS BOARD IN REFUSING TO RECOGNIZE A UNION AS REPRESENTATIVE OF EMPLOYEES IN A UNIT WHICH SEEMS TO BE IN APPROPRIATE, ITS REFUSAL IS NOT A VIOLATION OF THE ACT.**

Appellant challenges the materiality of the fact "that the Company acted in a good faith belief that the ORT units are now inappropriate for collective bargaining" (Appellant's Br., p. 30).

The Board has held exactly contrary, where, as here, the employer's good faith reliance was based on the Board's own most recent decisions.

In *Chalet, Inc.* (Nov., 1953) 107 NLRB No. 42, the National Labor Relations Board, in considering a refusal to-bargain charge under section 8(a)(5) filed against an employer, held (as reported in 33 LRRM 1071-1072):

"On January 13, 1953, the union advised the employer that it represented the employer's three cutter and was seeking recognition and bargaining for the cutters. The employer replied that he was not prepared to make a decision on such short notice and that he wanted to discuss the matter with others.

* * * * *

be in a separate or in an over-all unit must be determined by an election is based on the premise that either the separate or the over-all unit is appropriate. The facts here do not support such an alternative. The record clearly establishes that a separate unit is not appropriate.

The following day, the employer advised the union that he would not recognize the union because it did not represent a majority of the whole shop. Thereupon, the three cutters walked out of the plant.

The employer's refusal to recognize the union on the ground that a separate unit of cutters was inappropriate was not unreasonable, even though a separate unit of cutters is appropriate. In the area where the employer's plant is located, the union did not represent a separate unit of cutters. Moreover, the NLRB in its only decisions involving clothing factories in the area found that cutters did not constitute separate appropriate units (Kohen-Ligon-Foltz, Inc. 36 NLRB 808 [9 LRRM 176]; Morten-Davis Company, 36 NLRB 804 [9 LRRM 176]; Justin McCarty, Inc., 36 NLRB 800 [9 LRRM 176]).

* * * * *

Complaint is dismissed."

In connection with the matter of good faith, Appellant cites *Republic Aviation Corp. v. Board* (1945) 324 U.S. 793, and *Radio Officers' Union v. Labor Board* (1954) 347 U.S. 17 (Appellant's Br., p. 30). These two cases are concerned with alleged discriminatory treatment of employees in violation of section 8(a)(3) not here involved. However, in the *Radio Officers' Union* case the court held that the employer's "real motive" is decisive, though specific evidence of intent is not an indispensable element of proof where intent can be inferred. Here the only intent which can possibly be inferred is the intent of the Company to follow the requirements of the statute as applied to facts and circumstances specifically found by the Board.

The two other cases cited by Appellant on this point: *May Stores Co. v. Labor Board* (1945) 326 U.S. 376, and *Jaffee v. Henry Heide, Inc.* (S.D.N.Y. 1953) 115 F.Supp. 52, like so many other cases cited by Appellant, *supra* pp. 10-11, are concerned with a refusal to bargain within the first certification year.

Appellant questions the Company's good faith because it did not "raise the unit question in appropriate proceedings before the Board" (Appellant's Br., p. 25). Earlier in his brief Appellant refers to "the unrevoked certifications" (Appellant's Br., p. 17).

We find no provision in the Act for revoking a certification. Nor does there seem to be a need for it under the scheme of the Act. Certifications, being based on "circumstances at a given time,"⁸ after a reasonable time, usually one year, raise only a presumption. The Act does provide for the filing of a petition for "decertification"—but such a petition can only be filed by employees (sec. 9(c)(1); 2 U.S.C. 159(c)(1)). It is by this means that an employee may challenge the recognition currently extended by an employer to a union. Further, the Board will not hold decertification elections in units which are inappropriate for certification elections (*Lone Star Producing Company*, (1949) 85 NLRB 1137).

Under section 9(c) an employer may file a representation petition—alleging that a question of representation exists and requesting an election. Presumably the Ap

⁸*Pacific Telephone and Telegraph Company* (1944) 58 NLRB 1042, 1048, *supra*.

pellant believes the Company should have filed such a petition and then moved to dismiss it on the ground that in fact there was no substantial question of representation because the units claimed were inappropriate for bargaining. The situation would be unique.

As a matter of fact, it appeared to the Company, as we submit it would to any reasonable person, after a careful study of the Board decision of March 17, 1954, that further litigation of the appropriateness of separate toll maintenance units in its operations was wholly unnecessary. The matter seemed to be settled. Certainly the Company, after March 17, 1954, did not want to bear the responsibility of putting all parties to the inconvenience and expense of plowing again the ground which had been so completely worked.

CONCLUSION.

We submit that Appellant has failed to show an abuse of discretion by the District Court or to demonstrate that the District Court improperly denied the interlocutory injunction.

On the contrary, the record shows that in failing to prove the present appropriateness of the claimed bargaining units, the Appellant failed to present grounds for the issuance of an injunction. As the record shows that the claimed units are in fact inappropriate, and further that the Company acted in reasonable reliance upon the Board's own findings, there is no reasonable cause to believe that a violation of the Act has occurred.

We respectfully submit that the judgment of the District Court should be affirmed.

Dated, San Francisco, California,

October 11, 1954.

JOHN A. SUTRO,

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Attorneys for Appellees.

PILLSBURY, MADISON & SUTRO,

Of Counsel.

No. 14,475

IN THE

United States Court of Appeals
For the Ninth Circuit

GERALD A. BROWN, Regional Director of
the Twentieth Region of the National
Labor Relations Board, for and on be-
half of The National Labor Relations
Board,

Appellant,

vs.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a corporation, and BELL TELE-
PHONE COMPANY OF NEVADA, a corpo-
ration,

Appellees.

APPELLEES' PETITION FOR REHEARING
OR MODIFICATION OF DECISION.

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FILED

JAN 21

PAUL P. O'BRIEN,
CLERK

IN THE

**United States Court of Appeals
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GERALD A. BROWN, Regional Director of
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VS.

THE PACIFIC TELEPHONE AND TELEGRAPH
COMPANY, a corporation, and BELL TELE-
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ration,

Appellees.

**APPELLEES' PETITION FOR REHEARING
OR MODIFICATION OF DECISION.**

*To the Honorable William Denman, Chief Judge, and to
the Honorable Homer T. Bone and Walter L. Pope,
Circuit Judges, United States Court of Appeals for
the Ninth Circuit:*

We earnestly petition this Court either to grant a re-
hearing or to modify its decision in so far as that decision
directs the trial court to grant all the relief sought by

appellant on the ground that such direction is in conflict with decisions of the Supreme Court of the United States and of this Court.

The decision (Opinion, p. 4) provides:

“The judgment is reversed and the district court ordered to grant the relief sought by the Board.”

We respectfully call to the Court's attention that relief sought by appellant—the prayer of appellant's petition (R.¹ 14-15)—was not limited to the specific matters considered by this Court in its opinion. In paragraph (e) of its prayer appellant sought a blanket order restraining the employers from (R. 15)

“In any other manner interfering with, restraining or coercing their employees in the exercise of their rights to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any or all of such activities.”

Thus, if the decision of this Court directing the trial court “to grant the relief sought by the Board” is allowed to stand, the trial court will be required to issue a blanket order in effect restraining the employers from violating any provision of the National Labor Relations Act relating to the rights of any of their employees to join labor organizations or to bargain collectively through representatives of their own choosing.

¹Reference to the printed Transcript of Record is designated “R.”

The words of paragraph (e) of appellant's prayer are virtually word for word the same as part of the more limited cease and desist order which this Court ordered stricken in *National Labor Relations Bd. v. Cowles Pub. Co.* (9th Cir. 1954) 214 F.2d 708, 711. In this respect the decision of this Court in the case at bar is also contrary to decisions of the Supreme Court of the United States condemning such blanket restraints.

Labor Board v. Express Pub. Co. (1941) 312 U.S. 426, 435-438;

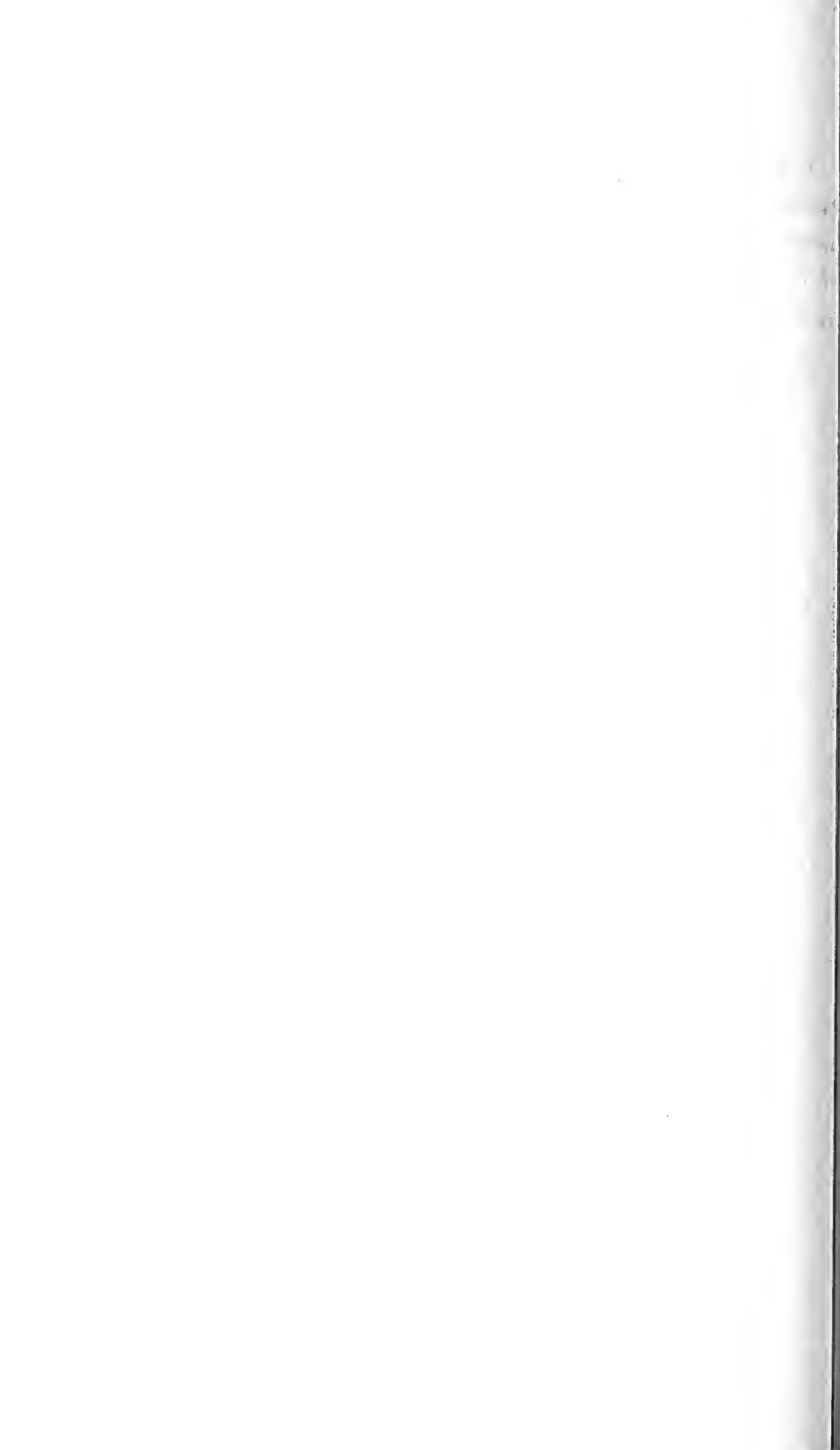
May Stores Co. v. Labor Board (1945) 326 U.S. 376, 386-393;

Labor Board v. Crompton Mills (1949) 337 U.S. 217, 226.

As the Supreme Court of the United States pointed out in *Labor Board v. Express Pub. Co.* (1941) 312 U.S. 426, 435-436, *supra*:

“* * * the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.”

For the same reason, a determination that the employers may have violated the Act in respects discussed in this Court's opinion does not justify a blanket restraint which would subject them to contempt proceedings if they should be charged with some new and wholly unrelated violation of the National Labor Relations Act.



No. 14,476

**United States Court of Appeals
For the Ninth Circuit**

DOMINADOR DIMAPILIS AURE,	}
vs.	
UNITED STATES OF AMERICA,	
	<i>Appellant,</i>
	<i>Appellee.</i>

BRIEF FOR APPELLANT.

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FILED

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United States Court of Appeals For the Ninth Circuit

DOMINADOR DIMAPILIS AURE,	}
<i>Appellant,</i>	
vs.	
UNITED STATES OF AMERICA,	}
<i>Appellee.</i>	

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

Appellant filed a petition for naturalization under the provisions of the Act of June 30, 1953, Public Law 86, 83rd Congress, in the United States District Court for the Northern District of California, Southern Division, on August 26, 1953 (T. 1). His petition for naturalization was denied by District Judge Louis E. Goodman on May 5, 1954 (T. 12). Notice of Appeal was filed with the Clerk of the above-entitled Court on July 2, 1954 (T. 15).

Jurisdiction of the District Court to entertain the petition for naturalization is conferred by Section 310(a) of the Immigration and Nationality Act (8 U.S.C.A. 1421). Jurisdiction of the Court of Appeals to review the District Court's final order is conferred

by Section 128 of the Judicial Code, as amended (28 U.S.C.A. 1291).

The order of the District Court denying the petitioner's application for United States citizenship is a final decision within the meaning of Section 128 of the Judicial Code (See *Tutun v. U. S.*, 270 U.S. 568, 46 S. Ct. 425, 70 L. Ed. 738; *U. S. v. Rodick*, 162 F. 469).

STATEMENT OF THE CASE.

The petitioner is a 25 year old male, a native and citizen of the Philippines. He resided continuously in the Philippine Islands from the time of his birth until a date subsequent to his enlistment in the United States Navy. At the time of his enlistment in the United States Navy on April 10, 1946, he was a national of the United States. He lost such United States nationality on July 4, 1946 by virtue of the provisions of the Philippine Independence Act, 48 Stat. 456, and Presidential Proclamation 2695, dated July 4, 1946, 60 Stat. 1352. The petitioner has served continuously in the United States Navy since the date of his enlistment.

The petitioner first entered continental United States as a member of the United States Navy at the Port of San Pedro, California during the month of November, 1946. Since that date, he has made numerous trips in and out of the United States always as a member of our Armed Forces. He has never been lawfully admitted to the United States for permanent

residence upon presentation of a valid immigration visa.

The petitioner filed in the United States District Court for the Northern District of California, Southern Division on August 26, 1953, a petition for naturalization, claiming the exemptions of Public Law 86, 83rd Congress, enacted June 30, 1953. The Designated Naturalization Examiner recommended that the petition for naturalization be denied "upon the ground that the petitioner has failed to establish eligibility to proceed toward naturalization under the provisions of Public Law 86, 83rd Congress".

The petitioner submitted substantial and probative proof that he is, and has been for more than the next five years preceding the filing of his petition for naturalization, a person of good moral character; that he is attached to the principles of the Constitution of the United States and meets the requirements of favorable disposition to the good order and happiness of the United States for the period prescribed by law. The foregoing is admitted by the Immigration and Naturalization Service and is not in issue in this case. The United States Navy highly recommends that the petitioner be admitted to United States citizenship.

STATUTES INVOLVED.

All of the pertinent parts of
Public Law 86, 83rd Congress,
Section 328, Immigration and Nationality Act,
(8 U.S.C.A. 1439)
Section 324, Immigration and Nationality Act,
(8 U.S.C.A. 724)
Section 316, Immigration and Nationality Act,
(8 U.S.C.A. 1427)
Section 318, Immigration and Nationality Act,
(8 U.S.C.A. 1429)
are fully set forth in the Appendix attached hereto.

SPECIFICATION OF ERRORS.

1. That the appellant has complied with the statutory requirements for naturalization.
 2. That the District Court erred in denying the appellant's petition for naturalization.
-

SUMMARY OF ISSUES AND LEGAL ARGUMENT.

It is appellant's contention that Section 328 of the Immigration and Nationality Act of 1952 provides that any person who has served in the Armed Forces of the United States continuously for an aggregate period of at least three years, who is presently serving therein, who is a person of good moral character and attached to the Constitution of the United States, may be naturalized without a lawful admission for permanent residence.

ARGUMENT.

The appellant filed his petition for naturalization seeking admission to United States citizenship under the provisions of Public Law 86, 83rd Congress. It is not believed that it was the intention of Congress in Public Law 86 to grant naturalization to numerous aliens who honorably served during the Korean crisis and deny the same privilege to those aliens who enlisted in our armed forces while they were nationals of the United States and while they were residents of any outlying possession of this country. However, since the language of that law appears to be clear and explicit, for the sake of this argument it is conceded that the petitioner is not eligible for naturalization under the provisions of that part.

Public Law 86, 83rd Congress (8 U.S.C.A. 1440a), is not the only statute granting expeditious naturalization to members of the armed forces of the United States which was in effect at the time this petition was filed on August 26, 1953. Section 1440 of Title 8, U.S.C.A., provides for the naturalization of those who performed active duty and service in the armed forces of the United States during World War I and/or World War II. Section 1439 of the same Title provides for the expeditious naturalization of certain aliens who have served honorably in the armed forces of the United States for a period or periods aggregating more than three years.

It is not necessary that this petitioner establish his eligibility under the provisions of Public Law 86 (8 U.S.C.A. 1440a) in order to be admitted to United

States citizenship. If the facts contained in the applicant's petition meet any of the statutory requirements qualifying an individual for United States citizenship, he is entitled to claim the rights afforded under the other provisions of statutory law. In other words, if he is admissible to United States citizenship under any other section in effect at the time of filing the said petition, he is entitled to naturalization at this time. *Yuen Jung v. Barber*, 184 F.2d 491, 496.

Many years ago, the Supreme Court of the United States in the case of *Tutun v. U. S.*, 70 L. Ed. 738, at page 742, stated:

“* * * There is a statutory right in the alien to submit his petition and evidence to a Court, to have that tribunal pass upon them, and, if the requisites are established, to receive the certificate.”

Also compare:

U. S. v. Schwimmer, 73 L. Ed. 889, 891, 279

U.S. 645, 649;

Petition of Kavadias, 179 F.2d 497, 500;

In re Jow Gim, 175 F.2d 299, 303;

Stasiukevich v. Nicholls, 168 F.2d 474, 477.

The question involved in this case appears to be one of first impression, making it necessary to review the history of the naturalization process in order to reach a proper conclusion in this matter.

The present legislation is not the first time that Congress has provided a special class of naturalization for the benefit of members of the armed forces. It is not necessary to review the entire history pertaining

to this type of legislation. For years Congress has granted certain benefits and exceptions for persons who served in the military or naval forces.

Section 2166, R.S.U.S., as amended by sec. 2, act of May 9, 1918, 40 Stat. 547; U.S.C., title 8, sec. 395; sec. 4, act of June 29, 1906, as amended by the act of May 9, 1918, 40 stat. 542-546; as amended by sec. 6(d), act of March 2, 1929, 45 Stat. 165; U.S.C., title 8, secs. 388 to 394, inc.; (U.S.C., title 8, sec. 388). Act of July 19, 1919, 41 Stat. 222; secs. 1 and 7, act of May 26, 1926, 44 Stat. (pt. 2) 654, 655; U.S.C. title 8, sec. 241; sec. 3, act of March 4, 1929, 45 Stat. 1546; U.S.C., title 8, sec. 392a; sec. 1, act of May 25, 1932, 47 Stat. 165; U.S.C., title 8, sec. 392b; act of June 24, 1935 (Public No. 160, 74th Cong.), and act of June 24, 1935 (Public No. 162, 74th Cong.), and act of August 23, 1937 (50 Stat. 743) and act of June 21, 1939 (53 Stat. 851).

The Nationality Act of 1940 provided by Section 324 that any person who had served honorably in the armed forces at any time for a period or periods aggregating three years could be naturalized without continuous residence within the United States. This Act also eliminated filing of a declaration of intention or a certificate of arrival showing lawful admission for permanent residence. Following the entry of the United States into World War II, and the induction of a large number of aliens into the armed forces,

Congress once again reviewed the legislative history of the naturalization of veterans, and immediately adopted new procedures for their prompt naturalization.

As a result, the Second War Powers Act of 1942 (56 Stat. 182) added Sections 701 to 705 to the Nationality Act of 1940 (8 U.S.C.A. 1001 to 1005). This Act was subsequently amended by the Act of December 22, 1944 (58 Stat. 885), and the Act of December 28, 1945 (59 Stat. 658). This legislation specifically provided that any non-citizen who had served honorably in the armed forces of the United States during World War II and prior to December 28, 1945 could secure prompt naturalization if his petition was filed not later than December 31, 1946.

The Act of June 1, 1948 (62 Stat. 282) added Section 324A to the Nationality Act of 1940. This Act provided permanent legislation to facilitate the expeditious naturalization of any veteran who served during certain specific periods of time and who was honorably discharged from the armed forces of the United States. The Act contained no time limitation with respect to the filing of petitions thereunder. This Act likewise provided that the petitioner was not required to establish any period of residence within the United States or in any State.

As previously stated, at the time this petition was filed on August 26, 1953, there was then and there in effect the Immigration and Nationality Act of 1952 (Public Law 414, 82nd Congress, 2nd Session). Query:—Is this applicant entitled to admission to

United States citizenship under the statutory provisions of Section 328, Immigration and Nationality Act of 1952, (8 U.S.C.A., 1439)? It is asserted that he is for three reasons:

1. That Section 328 of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1439) is entitled to the same construction as Section 324 of the Nationality Act of 1940;
2. That such section by its own language clearly indicates that any person who files his petition for naturalization while serving in the armed forces of the United States under the provisions of that part need not comply with the requirements of Section 316(a) of the same act, (8 U.S.C.A., 1427a), and
3. That the legislative history of the Immigration and Nationality Act of 1952 clearly indicates the Congressional intent to continue the expeditious naturalization provisions pertaining to persons in this category.

POINT I.

Beyond any doubt, the Immigration and Naturalization Service would not interpose any objection to the naturalization of this petitioner if his application were being considered under the provisions of Section 324 of the Nationality Act of 1940. The Courts and the Immigration and Naturalization Service ruled on numerous occasions that an alien who filed a petition for naturalization under Section 324

of the Nationality Act of 1940 was not required to perform such service subsequent to a lawful entry into the United States.

The District Court for the Western District of New York states in *In re Fleischmann*, 49 F. Supp. 223, at page 224:—

“(1) It appears palpable that such ‘residence’ in Section 324(c) only calls for such residence as may be verified and proved in the same manner as under Section 309, *supra*. It would do violence to the clear intent of both Section 324 and Section 325 to hold that only ‘legal residence’ was considered in Section 324(c). If ‘legal residence’ was intended in Section 324(c), then there would be no point in exempting the petitioner from a certificate of arrival except to save him a fee therefor. These sections were intended to relieve similarly situated petitioners of proof of ordinary legal residential requirements of which the pursuit of their calling made difficult. Then, in Section 324(d) and its counterpart under Section 325, where the termination of such service has been more than six months preceding the date of filing the petition, compliance with the requirements of Section 309 is mandatory.”

A similar ruling was reached in the case of *Petition of Gislason*, 47 F. Supp. 46.

This point was considered by the Court of Appeals for the Ninth Circuit in the case of *Yuen Jung v. Barber*, *supra*. In a footnote at the bottom of page 497, the Court stated:

“12. We have considered the question, not argued here, whether the order must be affirmed

because of petitioner's original illegal entry. But since the requirement of lawful entry in the ordinary case, is based upon the statutory requirement of continuous residence, *United States v. Kreticos*, 59 App. D.C. 305, 40 F2d 1020, we have concluded that since section 724a not only dispenses with certificates of arrival but expressly provides that 'no period of residence within the United States * * * shall be required', lawful entry is not a condition to naturalization under this section."

Let us compare the language of Section 324 of the Nationality Act of 1940 (8 U.S.C.A. 724) with the language of Section 328 of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1439). The pertinent parts of these two sections are set forth in the appendix at pages i-iv.

The Court is requested to take judicial notice of the fact that any petitioner for naturalization, whether he files under the veteran provisions or general provisions of the Immigration and Nationality Act, is no longer required to comply in all respects with the provisions mentioned in subparagraphs (b) (1) and (b) (2) of Section 324 of the Nationality Act of 1940. Both of such requirements have been eliminated from the provisions of the new Act. A close examination of the language of these two sections from different Acts will show that they are substantially identical. Since there was no material change in the language of subparagraph (a) of the two sections, the earlier judicial and administrative determinations are entitled to great weight.

If the appellant was entitled to naturalization under Section 324 of the old Act, he is entitled to naturalization under similar language contained in the new Act. It must be presumed that at the time of Congressional reenactment of the provisions of Section 324 of the Nationality Act of 1940 in substantially the same language, Congress had full knowledge and information as to the judicial and executive decisions with respect to such prior existing legislation. Since Congress did not explicitly declare, either expressly or by implication, an intention to change the provisions of that section, it must be presumed that the prior interpretations are controlling here.

It is asserted that under the judicial precedents heretofore cited that this petitioner is entitled to admission to United States citizenship at this time for the reasons heretofore set forth.

POINT II.

Let us turn to the second point which we feel must be discussed in order to fully cover this matter. Considering the language of Section 328 of the Immigration and Nationality Act of 1952 (8 U.S.C.A., 1439), it is possible to reach only one conclusion, i.e., that any person who has honorably served in the armed forces of the United States for an aggregate period or periods exceeding three years and filed his petition while still in such service or within six months thereafter does not have to comply with the requirements of

Section 316(a) of the same Act) (App. iv), in order to be eligible for this expeditious naturalization.

Subparagraph (a) of the 1952 Act provides that the petitioner “may be naturalized without having resided continuously immediately preceding the date of filing such person’s petition in the United States for at least five years and in the state within which the petition for naturalization is filed for at least six months and *without having been physically present in the United States for any specified period * * **”. (Emphasis supplied). Subparagraph (d) of the same Act, which sets forth the residence requirement for persons filing under the provisions of that section specifically provides that where a person files his petition more than six months after the termination of his honorable service, he must comply with the requirements of Section 316(a) of the same Act.

Section 316 of the Immigration and Nationality Act of 1952 (8 U.S.C.A. 1427) sets forth the general requirements in order to qualify for naturalization. Subparagraph (a) thereof pertains to residence. It is clear that any person seeking naturalization under the general statute can only do so after he has resided continuously in the United States for a period of at least five years after being lawfully admitted to the United States for permanent residence. However, the 1952 Act sets forth certain exempt classes who do not necessarily have to meet all of the general requirement provisions of Section 316. For example, Section 319 (8 U.S.C.A. 1430) provides that an individual married to an American citizen spouse may

be naturalized upon compliance with all of the requirements of Section 316 except that three years is substituted in lieu of the five-year period.

Section 329 (8 U.S.C.A. 1440) provides for the expeditious naturalization of those who performed honorable service in the armed forces of the United States during World War I or World War II. That section states that such naturalization can only be granted if the person was in the United States at the time of enlistment or induction whether or not he had been lawfully admitted to the United States for permanent residence, or in the alternative, if the induction or enlistment was abroad that he was subsequently admitted to the United States for permanent residence. Section 330 (8 U.S.C.A. 1441) of the same Act provides for the expeditious naturalization of certain aliens who had aggregate honorable service of at least five years on board American vessels. If the person seeking the benefits of that section had five years of service prior to September 23, 1950, he is not required to establish a lawful admission for permanent residence. However, if the aggregate period of five years served on board American vessels is completed subsequent to September 23, 1950, such person must have been lawfully admitted to the United States for permanent residence prior to filing his petition for naturalization.

The foregoing exemptions are cited in order to draw the attention of the Court to the fact that in each of the other exempt classes the section of law specifically sets forth the requirement concerning lawful admis-

sion to the United States for permanent residence. The absence of any such language in subparagraph (a) of Section 328 is indicative of the Congressional intention to exempt persons seeking this benefit from the provisions of that part.

Since the persons who filed their petitions under the provisions of Section 328 more than six months after termination of their service in the armed forces are required by the expressed provisions of subparagraph (d) to comply with the residence requirement of Section 316(a) of the same Act, exclusion of those who file while still in active service or within six months after termination of such service is implied.

It is a general rule of law that:

“All parts, provisions, or sections of a section, must be read, considered, or construed together, and each must be considered with respect to, or in the light of, all the other provisions or sections, and construed in connection or harmony with the whole.” 82 C.J.S. 694.

We do not feel that there is any ambiguity in the language of Section 328 when reasonable and effective construction is given to all parts of that section. Subparagraph (d) of Section 328 may be considered as a proviso or an exception, reshaping or modifying the text of subparagraph (a). Subparagraph (d) was inserted with a purposeful and deliberate intention. Subparagraph (d) states that in some cases (where the petition is filed more than six months after termination of service) a person seeking naturalization under the provisions of subparagraph (a) must com-

ply with the provisions of the general naturalization statute as contained in Section 316(a). Any other construction would read into the provisions of subparagraph (a) language which is not contained in the statute. Omission of the lawful admission provision in subparagraph (a) clearly indicates the Congressional intent to exempt persons seeking naturalization under this section from complying with those requirements.

The Court's attention is invited to the long established rule of law that in construing a statute, the intent and purpose of the act must be considered and further where there are general and special provisions covering the same subject, the special provisions will prevail. In the case of *Rogers v. United States*, 185 U.S. 83, the United States Supreme Court stated at page 87:

“It is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of such earlier statute. In other words, where there are two statutes, the earlier special and the later general—the terms of the general broad enough to include the matter provided for in the special—the fact that one is special and the other is general creates a presumption that the special is to be considered as remaining an exception to the general, and the general will not be understood as repealing the special, unless a repeal is expressly named, or unless the provisions of the general are manifestly inconsistent with those of the special.”

This same Court referred on page 89 to the opinion of Mr. Justice Christiancy speaking for the Supreme Court of the State of Michigan in the case of *Crane v. Reeder*, 22 Michigan 322, 344, and quoted from that case as follows:

“Where there are two acts or provisions, one of which is special and particular, and certainly includes the matter in question, and the other general which, if standing alone, would include the same matter and thus conflict with the special act or provision, the special must be taken as intended to constitute an exception to the general act or provision, especially when such general and special acts or provisions are contemporaneous as the legislature is not to be presumed to have intended a conflict.”

In the case of *McCaughn v. Hershey Chocolate Company*, 283 U.S. 488, at 492, the Court stated:

“Possible doubts as to the proper construction of the language used should be resolved in the light of the administrative and legislative history.”

See also:

Posadas v. National City Bank, 296 U.S. 497, at pp. 503-504.

The United States Court of Appeals for the Eighth Circuit in the case of *United States v. Windle*, 158 F.2d 196, at page 199, stated:

“We recognize the rule that generally special terms of a statute prevail over general terms in the same or another statute which might other-

wise control. *MacEvoy v. United States*, 322 U. S. 102, 64 S. Ct. 890, 88 L. Ed. 1163; *Robinson v. United States*, 8 Cir., 142 F.2d 431. But the purpose of this rule is to give effect to presumed intention of the law-making body. The primary rule of statutory construction requires us to ascertain and give effect to the legislative intention, *Flippin v. United States*, 8 Cir., 121 F.2d 742; *United States v. Hartwell*, 73 U. S. 385, 18 L. Ed. 830 * * *."

The United States Court of Appeals for the Fifth Circuit in the case of *Dealer's Transport Co. v. Reese; Clark v. Same*, 138 F.2d 638, at page 640, stated:

"It is the duty of the court to reconcile asserted ambiguities, if possible, and to give effect to all parts of a statute so as to effectuate the intent and purpose of the legislature."

It is contended that the language of Section 328 removes the petitioner from that group of individuals who must qualify under the general naturalization requirements set forth in Section 316 of the same Act.

POINT III.

In order to protect the petitioner's interests, it is deemed advisable to discuss the legislative history relating to this particular section of the Immigration and Nationality Act of 1952.

After approximately three years of intensive and searching investigation, as well as an exhaustive study,

Congress on June 27, 1952 passed H.R. 5678, the so-called McCarran-Walter Act. The exhaustive investigation and study was incorporated into a voluminous report (S. Rep. 1515, 81st Congress, 2nd Session) which contains certain basic findings and suggestions of the Committee. Upon conclusion of that study, the Bill S-3455 was introduced by Senator McCarran in the 81st Congress—no action was taken. In the 82nd Congress, S-716, introduced by Senator McCarran, and H.R. 2379, introduced by Mr. Walter, were presented to the respective two Houses of Congress for their consideration. Following a number of hearings and numerous conferences conducted on the proposed legislation, two modified versions were introduced; S. 2055 by Senator McCarran, and H. R. 5678 by Mr. Walter. It was the modified version introduced by Mr. Walter which was finally adopted and passed by Congress as the Immigration and Nationality Act of 1952.

Where the statutory language of an Act is not plain or where ambiguity exists, the Courts may look to the legislative history for further evidence of the legislative intent in order to determine the policy of the legislation as a whole.

Chatwin v. U. S., 326 U.S. 455, 464;

U. S. v. Rosenblum Truck Lines, 315 U.S. 50, 55.

The Congressional debates shed no light on this pertinent provision of the Immigration and Nationality Act. In the exhaustive study prepared by the

Committee on the Judiciary of the United States Senate, Report No. 1515, 81st Congress, 2nd Session, there is a limited explanatory comment pertaining to this provision. At page 703, et seq., when discussing naturalization—special classes—under the subparagraph pertaining to armed service personnel, the following appears:

“At the present time section 324 of the act provides that a person who has served honorably at any time in the Army, Navy, Marine Corps or Coast Guard for 3 years and who, if separated from the service, has been honorably discharged, may be naturalized upon petition while in the service or within 6 months after termination of his service. No declaration of intention, certificate of arrival, or residence within the court’s jurisdiction is required, but with these exceptions the other requirements to naturalization, including racial eligibility, must be complied with. If the alien is in the service at the time of naturalization he may be naturalized immediately by appearing before a representative of the Immigration and Naturalization Service, accompanied by two citizen witnesses. If, however, he files for naturalization more than 6 months after completion of his honorable service, he must comply with the general residence requirements of the act—that is, 5 years’ continuous residence in the United States and 6 months in the state—but his service in the armed forces, wherever it has occurred, is to be considered as residence within the United States and the State.”

Subsequently, the Committee at page 709, et seq., stated:

“G. Conclusions and Recommendations.

* * * * *

Residence

The subcommittee considers and finds that one of the weak spots in our naturalization law is the lack of uniformity in residence requirements for naturalization. While recognizing the various reasons which prompted enactment of the exceptions to the 5-year residence requirement, the subcommittee feels that the requirement should be made uniform and accordingly recommends:

* * * * *

(c) Persons who serve honorably in the armed forces or Coast Guard for 3 years. This class of persons may be naturalized under Section 324 of the present act after 3 years' service, and the subcommittee recommends that this privilege be preserved in the proposed law.”

The foregoing excerpt, indicating the Congressional intent to carry forward the basic principles of Section 324 of the Nationality Act of 1940, clearly indicates the admissibility of this alien to United States citizenship at this time under the judicial precedents heretofore cited.

POINT IV.

In the lower Court, the Immigration and Naturalization Service by inference conceded that this appellant is exempt from the provisions of Section 316(a) of the Immigration and Nationality Act. It was, however, seriously contended that Section 318 of the same Act (8 U.S.C.A. 1429; App. v) required ap-

pellant to show a lawful permanent entry. Since both of these Sections, 316 and 318, demand lawful admission for permanent residence as a prerequisite to naturalization, appellant should not be found exempt from the requirements of one and barred by the identical language in the other without careful analysis of the text and motivating purpose of the statute said to prohibit his admission to citizenship.

Proper approach to this task was aptly and succinctly described by the Supreme Court in *Brown v. Duchesne*, 19 How. 183, 15 L. Ed. 595:

“It is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature, as thus ascertained, according to its true intent and meaning.”

Section 318 reads, in part, as follows:

“Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this Act. * * * Notwithstanding the provisions of section 405(b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act;”

Section 318, quoted in part above, at first blush prohibits the naturalization of any alien not lawfully admitted for permanent residence, except as otherwise provided. Further along in the text, the section prohibits the naturalization of any alien against whom there is outstanding a final finding of deportability "except as provided in sections 327 and 328". Neither section 327 nor section 328 contains language dealing with the naturalization of an alien under deportation proceedings or against whom there is a final finding of deportability. In the text of neither section is there reference to exempting otherwise eligible citizenship applicants from the requirements of section 318, nor indeed is section 318 mentioned.

Since no specific and direct exemption appears, it must be inferred. In addition, the phrase—"except as provided", can have but one meaning, i.e., sections 327 and 328 contain a proviso exempting them from the provisions of Section 318, not in part but *in toto*.

Simple logic dictates the conclusion that Congress did not intend in one stroke to prohibit the naturalization of alien veterans lawfully within the United States and authorize the admission to citizenship of those found subject to deportation. Yet clearly by the phrase "except as provided in Sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability", it is evident that in the language of Sections 327 and 328 there is authority to admit to citizenship an alien having the prerequisite military service despite the fact that he may have been found subject to deporta-

tion. Because the text of both Sections 327 and 328 contain phrases exempting aliens from the requirements of Section 316(a)—(which as previously noted embraces a requirement of admission for permanent residence), we submit that these exempting phrases stand as authority to admit an alien to citizenship if eligible under these Sections save for lack of admission for permanent residence. No other view is consonant with the unmistakable intent of the Legislators to reward honorable military service with the high privilege of American citizenship despite the fact that the veteran was not previously lawfully admitted for permanent residence or might indeed have been ordered deported.

CONCLUSIONS.

The right of Congress to prescribe the scope of examination for those who seek the privilege of naturalization is without doubt. The appellant has performed a service or duty that Congress saw fit to reward with special benefits. Since the appellant has met those qualifications, how can it be said that he is not eligible to that which Congress says he is entitled? The privilege of United States citizenship is cherished by all mankind, and a denial of that privilege—when all of the essential prerequisites have been met, is contrary to all of the legal concepts that form the foundation of our government.

PRAYER.

Wherefore, appellant prays that the decision of the District Court be reversed and that he be admitted to United States citizenship.

Dated, San Francisco, California,
November 8, 1954.

Respectfully submitted,

JACKSON & HERTOGS,

By: JOSEPH S. HERTOGS,

Attorneys for Appellant.

(Appendix Follows.)



Appendix.



Appendix

Public Law 86, 83rd Congress (8 U.S.C.A. 1440a):
“Notwithstanding the provisions of sections 310(d) and 318 of the Immigration and Nationality Act, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably, in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all of the requirements of the Immigration and Nationality Act, except that— * * *”.

Immigration and Nationality

Act of 1952, Section 328 (8 U.S.C.A. 1439).

“(a) A person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating three years, and, who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided continuously immediately preceding the date

Nationality Act of 1940, Section 324 (8 U.S.C.A. 724).

“(a) A person, including a native-born Filipino, who has served honorably at any time in the United States Army, Navy, Marine Corps, or Coast Guard for a period or periods aggregating three years and who, if separated from such service, was separated under honorable conditions may be naturalized without having resided, continuously

**Immigration and Nationality
Act of 1952, Section 328 (8
U.S.C.A. 1439).**

of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specified period if such petition is filed while the petitioner is still in the service or within six months after the termination of such service.

EXCEPTIONS.

(b) A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that—

(1) no residence within the jurisdiction of the court shall be required;

(2) notwithstanding section 1447(c) of this title, such petitioner may be naturalized immediately if the petitioner be then actually in the Armed Forces of the United States, and if prior to the filing of the petition, the petitioner and the witnesses shall have appeared before and been examined by a representative of the Service;

(3) the petitioner shall furnish to the Attorney General, prior to the final hearing upon his petition, a certified statement

**Nationality Act of 1940, Sec-
tion 324 (8 U.S.C.A 724).**

immediately preceding the date of filing such person's petition in the United States for at least five years and in the State in which the petition for naturalization is filed for at least six months, if such petition is filed while the petitioner is still in the Service or within six months after the termination of such service.

(b) A person filing a petition under subsection (a) of this section shall comply in all respects with the requirements of this subchapter except that—

(1) No declaration of intention shall be required;

(2) No certificate of arrival shall be required;

(3) No residence within the jurisdiction of the court shall be required;

(4) Such petitioner may be naturalized immediately if the petitioner be then actually in any of the services prescribed in subsection (a) of this section and if, before filing the petition for naturalization, such petitioner and at least two verifying witnesses to the petition, who

**Immigration and Nationality
Act of 1952, Section 328 (8
U.S.C.A. 1439).**

from the proper executive department for each period of his service upon which he relies for the benefits of this section, clearly showing that such service was honorable and that no discharges from service, including periods of service not relied upon by him for the benefits of this section, were other than honorable. The certificate or certificates herein provided for shall be conclusive evidence of such service and discharge.

**WHEN SERVICE NOT
CONTINUOUS.**

(c) In the case such petitioner's service not continuous, the petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing such petition between the periods of petitioner's service in the Armed Forces, shall be alleged in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon. Such allegation and proof shall also be made as to any period be-

**Nationality Act of 1940, Sec-
tion 324 (8 U.S.C.A 724).**

shall be citizens of the United States and who shall identify petitioner as the person who rendered the service upon which the petition is based, have appeared before and been examined by a representative of the Service.

(c) In case such petitioner's service was not continuous, petitioner's residence in the United States and State, good moral character, attachment to the principles of the Constitution of the United States, and favorable disposition toward the good order and happiness of the United States, during any period within five years immediately preceding the date of filing said petition between the periods of petitioner's service in the United States Army, Navy, Marine Corps, or Coast Guard, shall be verified in the petition filed under the provisions of subsection (a) of this section, and proved at the final hearing thereon by witnesses, citizens of

**Immigration and Nationality
Act of 1952, Section 328 (8
U.S.C.A. 1439).**

tween the termination of petitioner's service and the filing of the petition for naturalization.

RESIDENCE REQUIREMENT.

(d) The petitioner shall comply with the requirements of section 1427(a) of this title, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service within five years immediately preceding the date of filing such petition shall be considered as residence and physical presence within the United States.

MORAL CHARACTER.

(e) * * *''

Nationality Act of 1940, Section 324 (8 U.S.C.A. 724).

the United States, in the same manner as required by Section 709. Such verification and proof shall also be made as to any period between the termination of petitioner's service and the filing of the petition for naturalization.

(d) The petitioner shall comply with the requirements of section 709 as to continuous residence in the United States for at least five years and in the State in which the petition is filed for at least six months, immediately preceding the date of filing the petition, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service shall be considered as residence within the United States or the State.

(e) * * *''

Section 316 of the Immigration and Nationality Act (8 U.S.C.A. 1427):

“(a) No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided

continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all of the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.”

Section 318 of the Immigration and Nationality Act (8 U.S.C.A. 1429) :

“Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this Act. * * * Notwithstanding the provisions of Section 405(b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act: * * *.”



No. 14,476

IN THE

United States Court of Appeals
For the Ninth Circuit

DOMINADOR DIMAPILIS AURE,	}
<i>Appellant,</i>	
vs.	
UNITED STATES OF AMERICA,	}
<i>Appellee.</i>	

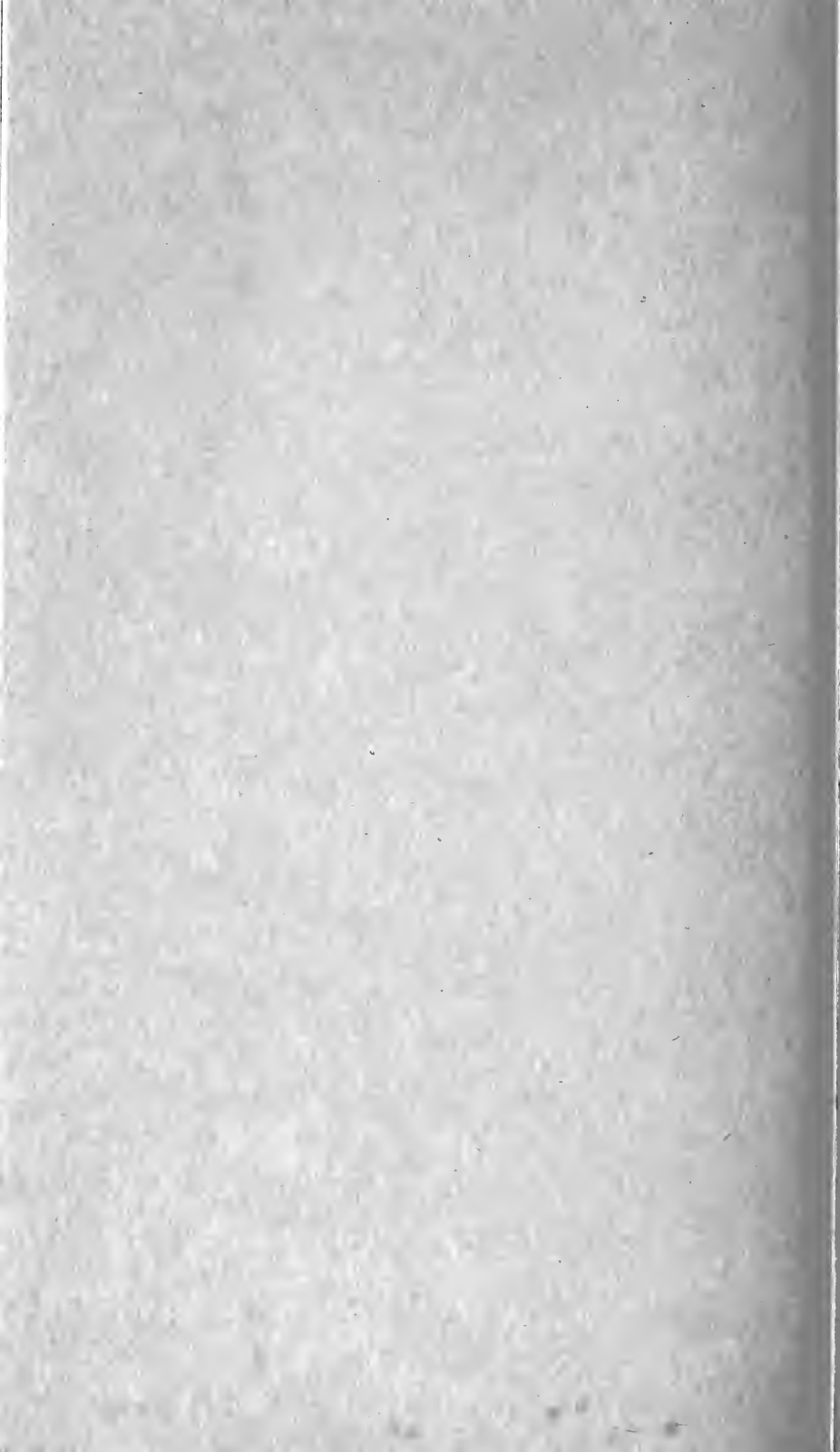
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FILED

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No. 14,476

IN THE

**United States Court of Appeals
For the Ninth Circuit**

DOMINADOR DIMAPILIS AURE,
Appellant,

VS.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLEE.

STATEMENT OF FACTS.

Appellant is a native and national of the Philippine Islands. He enlisted in the United States Navy in the Philippines on April 10, 1946 and at the time of his petition was still serving therein. As a member of the crew of a U.S. Navy vessel he entered the United States in November, 1946 and on many occasions thereafter. *He has never been admitted to the United States for permanent residence.* On August 26, 1953 appellant filed a petition for naturalization pursuant to the provisions of 8 *U.S.C.* 1440(a) (Public Law 86, June 30, 1953, 67 Stat. 108) as a member of the armed forces of the United States. By order dated May 4, 1954 (Tr. p. 12) the Court below denied appellant's petition.

The above facts are admitted.

STATUTES.

8 *U.S.C.A.* 1440a (Public Law 86, 83rd Congress):

“Notwithstanding the provisions of section 310(d) and 318 of the Immigration and Nationality Act, any person, not a citizen, who, after June 24, 1950, and not later than July 1, 1955, has actively served or actively serves, honorably in the Armed Forces of the United States for a period or periods totaling not less than ninety days and who (1) having been lawfully admitted to the United States for permanent residence, or (2) having been lawfully admitted to the United States, and having been physically present within the United States for a single period of at least one year at the time of entering the Armed Forces, may be naturalized on petition filed not later than December 31, 1955, upon compliance with all of the requirements of the Immigration and Nationality Act, except that . . .”.

8 *U.S.C.A.* 1439 (Immigration and Nationality Act of 1952, Sec. 328):

“(a) A person who has served honorably at any time in the armed forces of the United States for a period or periods aggregating three years and, who, if separated from such service, was never separated except under honorable conditions, may be naturalized without having resided continuously immediately preceding the date of filing such person's petition, in the United States for at least five years, and in the State in which the petition for naturalization is filed for at least six months, and without having been physically present in the United States for any specific period if such petition is filed while the petitione

is still in the service or within six months after the termination of such service.

EXCEPTIONS

“(b) A person filing a petition under subsection (a) of this section shall comply in all other respects with the requirements of this subchapter, except that . . .

* * * * *

RESIDENCE REQUIREMENT

“(d) The petitioner shall comply with the requirements of section 1427(a) of this title, if the termination of such service has been more than six months preceding the date of filing the petition for naturalization, except that such service within five years immediately preceding the date of filing such petition shall be considered as residence and physical presence within the United States.”

8 *U.S.C.A.* 1427 (Immigration and Nationality Act of 1952, Sec. 316):

“(a) No person, except as otherwise provided in this title, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing his petition for naturalization has resided continuously, after being lawfully admitted for permanent residence, within the United States for at least five years and during the five years immediately preceding the date of filing his petition has been physically present therein for periods totaling at least half of that time, and who has resided within the State in which the petitioner filed the petition for at least six months, (2) has

resided continuously within the United State from the date of the petition up to the time of admission to citizenship, and (3) during all of the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States.”

8 *U.S.C.A.* 1429 (Immigration and Nationality Act of 1952, Sec. 318):

“Except as otherwise provided in this title, no person shall be naturalized unless he has been lawfully admitted to the United States for permanent residence in accordance with all applicable provisions of this Act. * * * Notwithstanding the provisions of Section 405(b), and except as provided in sections 327 and 328 no person shall be naturalized against whom there is outstanding a final finding of deportability pursuant to a warrant of arrest issued under the provisions of this or any other Act; and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other Act: * * *.”

QUESTION PRESENTED.

Is appellant eligible for naturalization under the provisions of Title 8 *U.S.C.* 1439?

ARGUMENT.

Appellant concedes that he is *not* eligible for naturalization under Public Law 86, 83rd Congress (8 *U.S.C.* 1440(a)) but seeks to bring himself within 8 *U.S.C.* 1439.

The petition was filed under Public Law 86 but following *Yuen Jung v. Barber*, 184 F. 2d 491 (C.A.-9), if appellant is eligible under any statute the Court should properly apply it. Appellant endeavored to persuade the Court below, Petition for Naturalization of Dominador Dimapilis Aure, No. 105486 that he was eligible under 8 *U.S.C.* 1439. The ruling was against him. The Court said (Tr. p. 12):

“If petitioner were admitted for permanent residence he would be eligible for naturalization pursuant to any one of three provisions of the Nationality Code facilitating the naturalization of aliens who have served honorably in the armed forces.—Section 1439 . . . Section 1440 . . . and Section 1440(a) (P.L. 86) . . . *But his admission is a prerequisite to his naturalization pursuant to each of these three Code provisions.*” (Emphasis ours.)

And at Tr. p. 13:

“It is urged that the Congress did not intend that the 1952 Act should change the law in this respect (absence of permanent residence as a requisite under the Nationality Act of 1946, Sec. 324). However, Section 318 of the 1952 Act (8 *U.S.C.* 1429) declares that except as otherwise provided in the Act, ‘no person shall be naturalized unless he has been lawfully admitted to the

United States for permanent residence'. There is no provision relieving aliens who have served for three years in the armed forces from this requirement. It is true that there is no reference in the legislative history of the 1952 Act to this significant change in the law. Moreover, the House report on the 1952 Act, states that the Act 'carries forward substantially the provisions of existing law' in respect to the naturalization of aliens who serve for three years in the armed forces. House report 1365, 82nd Congress, 1952 U.S. Code Congressional and Administrative News, 1737. While this may raise a doubt as to the Congressional intent to make admission for permanent residence a prerequisite to the naturalization of such aliens, the Court cannot disregard the explicit statutory language." (Language in parentheses ours.)

The language of the statute is explicit. Section 1429 of Title 8 provides, "except as otherwise provided . . . *no person* shall be naturalized *unless* he has been lawfully admitted . . ." (Emphasis ours.)

Section 1439 of Title 8 permits a person *still in* the armed forces or *within six months after* termination, to have the benefits of the statute without having resided continuously in the United States for at least five years, and in the State of filing for at least six months, and without having been physically present in the United States for any specified time. If the person has been *out* of the service *more* than six months then he must comply with Section 1427(a) of Title 8 which requires continuous residence *after*

being lawfully admitted and immediately preceding the date of filing. In any event, the requirement of lawful admission for permanent residence specified by Section 1429 *must* be satisfied by a person seeking naturalization under Section 1439, whether he is *still in* the armed forces or *has been out* more than six months. The appellant herein has *not* been lawfully admitted for permanent residence.

It is respectfully submitted that the District Court did not err in denying appellant's petition.

Dated, San Francisco, California,
February 6, 1955.

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.

No. 14477

**United States
Court of Appeals**
for the Ninth Circuit

MARTIN JIMENEZ,

Appellant,

VS.

BRUCE BARBER,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Northern District of California,
Northern Division.**

FILED

NOV 29 1954

1874

THE STATE OF NEW YORK

IN SENATE

JANUARY 15, 1874

REPORT

OF THE

COMMISSIONERS OF THE LAND OFFICE

No. 14477

United States
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Appellant,

VS.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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240 Montgomery St.,
San Francisco 4, Calif.,

Attorneys for Petitioner and Appellant.

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Asst. United States Attorney,
P. O. Bldg.,
San Francisco, Calif.,

Attorneys for Respondent and Appellee.



In the United States District Court for the Northern
District of California, Southern Division

No. 33468

In the Matter of:

The Application of Martin Jimenez for a Writ of
Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable the Judges of the above-entitled
Court:

The petition of Martin Jimenez for a writ of habeas corpus respectfully shows:

I.

That he is by birth a citizen and national of the Republic of Mexico; that he has continuously resided in the United States since 1928, and has for many years past been a resident of San Francisco, within the jurisdiction of this Court.

II.

That he is unjustly and unlawfully detained and imprisoned by Bruce Barber, District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, in the Detention Quarters operated by the Immigration and Naturalization Service of the United States, at 630 Sansome Street, in the City and County of San Francisco, State of California, and is about to be deported from the United States to the Republic of Mexico.

III.

That the cause or pretext for such detention is a certain final order of deportation heretofore made by the Immigration and Naturalization Service of the United States ordering the deportation of your petitioner.

IV.

That your petitioner was heretofore arrested on a warrant charging him with deportability from the United States by reason of illegal entry into the United States. That proceedings were held purporting to constitute a hearing before a Hearing Officer of the Immigration and Naturalization Service as required by law. That at the said hearing your petitioner applied for suspension of deportation on the ground that he had been a resident of the United States for more than seven years prior to his application and had been for the preceding five years a person of good moral character, and was therefore eligible for suspension of deportation under the provisions of 8 USC §155(c)(2). That the Hearing Officer thereupon denied petitioner's application for suspension of deportation upon the ground that petitioner had failed to establish that he was not a member or former member of the Communist Political Association or the Communist Party. That petitioner thereupon appealed to the Board of Immigration Appeals, who, on March 9, 1954, dismissed petitioner's appeal.

V.

That the said order for petitioner's deportation is void, illegal and unconstitutional in that;

(a) It is not in accordance with the statute authorizing suspension of deportation, or

(b) In the alternative, that the statute authorizing suspension of deportation as construed and applied by the Immigration and Naturalization Service in this case is unconstitutional and void as a bill of attainder, prohibited by Article I, Sec. 9, Clause 3 of the Constitution of the United States, and

(c) The said statute, as construed and applied, violates the guarantee of due process of law in that it is too vague and uncertain to sufficiently apprise petitioner and all other persons affected by the said statute of what is prohibited thereby.

VI.

That the order of deportation is void and illegal in that it resulted from a failure and refusal by the appropriate officials of the Immigration and Naturalization Service of the United States, including the Hearing Officer, the Board of Immigration Appeals, and the Attorney General of the United States, to exercise the discretion to grant suspension of deportation vested in them by the said statute. That the said failure to exercise discretion was based upon the ground that the statute required petitioner to establish that he was not a member of any group or class to whom suspension of deportation was denied by the said statute, 8 USC §155(c), and specifically upon petitioner's failure to establish that he was not and had never been a member of the Com-

munist Political Association or the Communist Party of the United States.

VII.

That at the proceedings before a Hearing Officer of the Immigration and Naturalization Service petitioner was denied a hearing on the charges contained in the warrant of arrest and was subjected instead to an investigation into the status of petitioner in the United States under the immigration laws of the United States. That evidence was received, questions asked and allowed over objection, and conclusions drawn from such evidence and from petitioner's response to or failure to respond to such questions without regard to the relevance or materiality of the said evidence or questions to the charge contained in the warrant of arrest.

That petitioner was thereby denied due process of law as guaranteed by the Fifth Amendment of the Constitution of the United States.

VIII.

That during the course of the said investigation before a Hearing Officer of the Immigration and Naturalization Service, and at the outset thereof, the Hearing Officer announced his intention to sustain the charge contained in the warrant of arrest. That petitioner was thereby denied due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

IX.

That petitioner is informed and believes and on information and belief alleges that the denial of suspension of deportation in his case was based in part upon secret information contained in the file of the Immigration and Naturalization Service and not disclosed to your petitioner, but disclosed to and known by the Hearing Officer who recommended denial of suspension of deportation. That petitioner was thereby denied due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

X.

That petitioner is now held by the Immigration and Naturalization Service without bail. That petitioner has heretofore been at liberty on bond in the sum of \$1,000 and has on all occasions satisfied the conditions of the said bond and appeared whenever required to do so by the Immigration and Naturalization Service. That there exists no valid reason for denying to your petitioner release on reasonable bond or bail pending determination of this application for habeas corpus. That denial of release on bond is an abuse of discretion vested in the District Director of the Immigration and Naturalization Service for the Thirteenth Immigration District, and a denial of reasonable bail guaranteed by the Eighth Amendment to the United States Constitution.

Wherefore, your petitioner prays

(1) That a writ of habeas corpus be directed to

the said Bruce Barber, District Director, Immigration and Naturalization Service for the Thirteenth Immigration District, commanding him to produce the body of petitioner before this Honorable Court at a time and place therein to be specified, then and there to receive and to do what this Honorable Court shall order concerning the detention and restraint of your petitioner, and that your petitioner be ordered discharged from the detention and imprisonment aforesaid; or, in the alternative that an order to show cause be directed to the said Bruce Barber, commanding and ordering him to show cause before this Court on a day certain why the writ as prayed for above should not issue; and

(2) For an order admitting petitioner to bail in such amount as to the Court may seem just, pending final determination of this cause.

/s/ MARTIN JIMENEZ,
Petitioner.

Memorandum of Points and Authorities

I.

A statute inflicting some penalty by legislative fiat upon members of an easily ascertainable group is void as a bill of attainder.

United States v. Lovett,
328 U.S. 303.

II.

The Internal Security Act of 1950 as codified, 8 USC §137 (referred to in the statutory provision for

suspension of deportation, 8 USC §155(c)), has been questioned as a bill of attainder in prior cases. The question is now pending before the Supreme Court of the United States in *Galvan v. Press*, cert. granted 346 U.S. 812 (opinion below, Ninth Circuit, 201 F.2d 302). See also *Heikkila v. Barber*, 345 U.S. 229, recognizing that there is a serious question as to the constitutionality of this statute.

III.

Failure to exercise discretionary power to grant suspension of deportation is reviewable by a petition for habeas corpus, and withholding the exercise of discretion constitutes a denial of due process of law.

United States ex rel Accardi v. Shaughnessy,
...U.S...., 22 Law Week 4159, March 15,
1954.

GLADSTEIN, ANDERSEN &
LEONARD,

By /s/ LLOYD E. McMURRAY,
Attorneys for Petitioner.

Duly verified.

[Endorsed]: Filed April 7, 1954.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Upon reading the verified petition of Martin Jimenez, and good cause appearing therefor,

It Is Hereby Ordered that Bruce Barber, District Director of the Immigration and Naturalization Service of the United States for the Thirteenth Immigration District, be and appear before this Court on the 14th day of April, 1954, at the hour of 9:30 o'clock, A.M., then and there to show cause, if any he has, why a writ of habeas corpus should not issue herein as prayed, and that a copy of this order be served upon the said Bruce Barber, together with a copy of the petition for writ of habeas corpus herein.

It Is Further Ordered that the petitioner shall be held or allowed to remain within the jurisdiction of this Court until its further order herein.

Dated: April 7, 1954.

/s/ GEORGE B. HARRIS,

United States District Judge.

[Endorsed]: Filed April 7, 1954.

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes now Bruce G. Barber, District Director, Immigration and Naturalization Service (hereinafter referred to as "the Respondent"), by and

through his attorneys Lloyd H. Burke, United States Attorney for the Northern District of California, and Charles Elmer Collett, Assistant United States Attorney, to show cause why a Writ of Habeas Corpus should not be issued, admits, denies and alleges as follows:

I.

Admits that petitioner by birth is a citizen and national of the Republic of Mexico. Alleges that on March 12, 1927, petitioner was deported under a lawful order of deportation to Mexico. That respondent has no information or belief as to the residence of petitioner subsequent to March 12, 1927. Alleges that if petitioner has resided in the United States subsequent to March 12, 1927, such residence was and is unlawful in that any entry made into the United States subsequent to March 12, 1927, was illegal.

II.

Denies that petitioner is now or has ever been unjustly and unlawfully detained, or that petitioner has ever been imprisoned by the respondent. Any detention of petitioner by respondent was lawful under authority of a valid order of deportation. Respondent affirmatively asserts that petitioner is no longer in his custody and control; that on the 12th day of April, 1954, the above-entitled Court made an order——

“that petitioner Martin Jimenez shall be released upon bail to the Court in the sum of one thousand dollars (\$1,000), conditioned that he will personally appear and answer further

orders herein; and further, that the prior bond presently held by the Immigration and Naturalization Service in his case be exonerated'';

that respondent is informed and believes that a bond in the sum of One Thousand Dollars (\$1,000) was delivered to the Court; that pursuant to said order, the Immigration Bond was exonerated; and that petitioner is not now detained by nor is he in the custody of respondent in any manner or under any authority. Respondent admits that pursuant to a valid deportation order, he intended to deport petitioner from the United States to the Republic of Mexico.

III.

Denies that there was any pretext for the detention of petitioner, and alleges that said former detention was pursuant to and under authority of a valid and lawful final order of deportation issued on March 9, 1954.

IV.

Admits that petitioner was heretofore arrested on a warrant charging him with deportability from the United States by reason of illegal entry into the United States. Admits that a hearing was held before a Hearing Officer as required by law. Admits that during said hearing, petitioner applied for suspension of deportation as alleged. Admits that after full hearing, the Hearing Officer denied the application for suspension of deportation but denies that said application was denied on the ground that petitioner had failed to establish that

he was not a member or former member of the Communist Political Association or the Communist Party. Alleges that at such hearing, petitioner refused to answer questions concerning his membership or affiliation with the Communist Party, Communist Political Association, or other organization on the Attorney General's list of subversive organizations. Alleges that suspension of deportation was denied by the Hearing Officer on the ground that petitioner had failed to establish his eligibility for suspension of deportation. Admits that petitioner's appeal to the Board of Immigration Appeals was dismissed on March 9, 1954.

V.

Denies the allegations contained in Paragraph V of the petition.

VI.

Denies the allegations contained in Paragraph VI, and affirmatively asserts that there was no authority to exercise any discretion in granting of suspension of deportation because petitioner failed to establish his eligibility for such relief.

VII.

Denies the allegations contained in Paragraph VII of the petition.

VIII.

Denies the allegations contained in Paragraph VIII of the petition.

IX.

Denies the allegations contained in Paragraph IX of the petition.

X.

Denies that petitioner is now detained by respondent without bail, and affirmatively asserts that pursuant to the order of this Court dated April 12, 1954, the Immigration Bond was exonerated and respondent no longer has custody or control of the petitioner. Admits that petitioner was previously on liberty under bond in the sum of \$1,000, and that he complied with the conditions of the bond. Respondent denies all other allegations contained in Paragraph X of the petition.

Wherefore respondent prays that the Order to Show Cause be discharged and the Petition for Writ of Habeas Corpus be dismissed.

Dated: April 14, 1954.

/s/ LLOYD H. BURKE,

United States Attorney;

/s/ CHARLES ELMER COLLETT,

Assistant U. S. Attorney,

Attorneys for Respondent.

[Endorsed]: Filed April 14, 1954.

[Title of District Court and Cause.]

ORDER DISMISSING PETITION FOR
WRIT OF HABEAS CORPUS

The Attorney General, in the exercise of a broad discretion, refused to issue an order of suspension of deportation on the ground that petitioner had

failed to establish eligibility for the issuance of such an order. The power of the Court to set aside the ruling of the Attorney General is narrow and circumscribed. *Galvan v. Press*, S.Ct. No. 407, October term, 1953, decided May 24, 1954. In the light of petitioner's refusal to answer questions concerning membership in or affiliation with specific organizations, the Court may not interfere with the proceedings before the Immigration authorities;

Accordingly, It Is Ordered that the Writ of Habeas Corpus be, and the same hereby is, Denied; that the petition for the Writ be, and the same hereby is, Dismissed, and the order to show cause be, and the same hereby is, Discharged.

Dated: June 2, 1954.

/s/ GEORGE B. HARRIS,

United States District Judge.

United States, ex rel., Harisiades, v. Shaughnessy, 342 U.S. 524.

[Endorsed]: Filed June 2, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Comes now Martin Jimenez, petitioner herein, and appeals from the order of June 2, 1954, dismissing the petition for writ of habeas corpus, denying the issuance of the writ, and discharging the order to

show cause heretofore issued, to the Court of Appeals for the Ninth Circuit.

Dated: June 4, 1954.

GLADSTEIN, ANDERSEN &
LEONARD,

By /s/ LLOYD E. McMURRAY,
Attorneys for Petitioner and
Appellant.

[Endorsed]: Filed June 4, 1954.

[Title of District Court and Cause.]

COST BOND ON APPEAL

Whereas, Martin Jimenez is about to apply to the United States Circuit Court of Appeals, 9th District, in the matter of application for a Writ of Habeas Corpus.

Now, Therefore, in consideration of the premises, and of such appeal, the United Pacific Insurance Company, a corporated organization existing under and by virtue of the laws of the State of Washington and authorized to transact a general surety business in the State of California, as Surety, does hereby undertake and promise on the part of the appellant, that said appellant will pay all costs which may be awarded against him on said appeal or on a dismissal thereof, not exceeding Two Hundred Fifty and no/100 (\$250.00) Dollars, to which amount it acknowledges itself bound.

And further it is expressly understood that the

United Pacific Insurance Company, as Surety hereunder, in case of a breach of any condition of this bond, agrees that the Court in the above-entitled matter, may upon notice to it of not less than ten days, proceed summarily in the action, suit, case or proceeding, in which the same is given to ascertain the amount which said surety is bound to pay on account of such breach, and render judgment therefor against it, and award execution therefor.

In Witness Whereof, the said United Pacific Insurance Company has caused this obligation to be signed by its duly authorized Attorney-in-Fact at San Francisco, California, and its corporate seal to be hereto affixed, this 4th day of June, 1954.

UNITED PACIFIC
INSURANCE COMPANY.

[Seal] By /s/ ROBERT M. CARLTON,
Attorney-in-Fact.

State of California,
City and County of San Francisco—ss.

On this 4th day of June, 1954, before me, a Notary Public in and for said City and County, personally appeared Robert M. Carlton, personally known to me who, being by me sworn, did state that he is Attorney-in-Fact of the United Pacific Insurance Company, a corporation organized and existing under the laws of the State of Washington, that the seal affixed to the foregoing instrument is the corporate seal of said corporation; that the instrument was signed, sealed and executed in behalf

of said corporation by authority of its Board of Directors and further acknowledged that the said instrument and the execution thereof to be the voluntary act and deed of said corporation, by him voluntarily executed.

In Witness Whereof, I have hereunto subscribed my name and affixed my official seal at San Francisco, California, the day and year last above written.

/s/ MARY BLACK,

Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires November 12, 1956.

[Endorsed]: Filed June 7, 1954.

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

Comes now appellant herein, and designates as the record on appeal herein the complete record of proceedings had in the District Court, together with the Notice of Appeal and this Designation.

Dated: July 6, 1954.

GLADSTEIN, ANDERSEN &
LEONARD,

By /s/ LLOYD E. McMURRAY,
Attorneys for Appellant,
Martin Jiminez.

Service of copy acknowledged.

[Endorsed]: Filed July 6, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

Good cause appearing therefor,

It Is Hereby Ordered that the time within which appellant herein may file the record on appeal and docket said appeal with the Court of Appeals be, and it is hereby, extended to and including the 14th day of August, 1954.

/s/ O. D. HAMLIN,

United States District Judge.

[Endorsed]: Filed July 13, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and that they constitute the record on appeal herein as designated by the attorneys for the appellant:

Petition for Writ of Habeas Corpus.

Order to Show Cause.

Return to Order to Show Cause.

Order Dismissing Petition for Writ of Habeas Corpus.

Notice of Appeal.

Cost Bond on Appeal.

Designation of Record on Appeal.

Order Extending Time to File Record on Appeal.

Respondent's Exhibit A.

In Witness Whereof I Have Hereunto set my hand and affixed the seal of said District Court this 12th day of August, 1954.

[Seal] C. W. CALBREATH,
Clerk.

By /s/ WM. C. ROBB,
Deputy Clerk.

[Endorsed]: No. 14,477. United States Court of Appeals for the Ninth Circuit. Martin Jimenez, Appellant, vs. Bruce Barber, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed August 12, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE C. WICKS,

vs.

Plaintiff and Appellants,

SOUTHERN PACIFIC CO. (Pacific Lines),

Defendant and Appellee,

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Intervenor and Appellee.

PHILIP F. JENSEN,

vs.

Plaintiff and Appellant,

UNION PACIFIC RAILROAD CO., a corporation,

Defendant and Appellee,

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Intervenor and Appellee.

On Appeal From Order Denying Preliminary Injunction
and Order Granting Summary Judgment and Dismissal.

BRIEF FOR APPELLANTS.

HILL, FARRER & BURRILL,

CARL M. GOULD,

RAY L. JOHNSON, JR.,

411 West Fifth Street,

Los Angeles 13, California,

Attorneys for Appellants.

FILED

MAY 14 1955

PAUL P. O'BRIEN, CLERK



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Nos. 14483-84

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE C. WICKS,

Plaintiff and Appellants,

vs.

SOUTHERN PACIFIC CO. (Pacific Lines),

Defendant and Appellee,

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Intervenor and Appellee.

PHILIP F. JENSEN,

Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD CO., a corporation,

Defendant and Appellee,

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Intervenor and Appellee.

On Appeal From Order Denying Preliminary Injunction
and Order Granting Summary Judgment and Dismissal.

BRIEF FOR APPELLANTS.

Jurisdiction.

This Court has jurisdiction of this appeal by virtue of the authority of Section 1292, Title 28 U. S. C. A., which authorizes appeals from interlocutory orders of the district courts of the United States granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.

The constitutionality of the Railway Labor Act, Title 45, U. S. C. A. Section 151, *et seq.*, and, in particular,

Section 152 Eleventh thereof is involved. Section 152 Eleventh, Title 45, U. S. C. A. provides, in material part that any carrier and a labor organization are permitted to make agreements, requiring as a condition of continued employment that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class under certain conditions as set forth in the said section.

The complaint alleges that jurisdiction is based upon diversity of citizenship, a controversy involving more than \$3,000.00, and the determination of a federal question, namely, the constitutionality of certain provisions of the Railway Labor Act, and, in particular, Section 152 Eleventh, Title 45, U. S. C. A., the constitutionality of the collective bargaining agreement and arbitration proceedings and award made pursuant to, and under the authority of, the said statute [T. R. pp. 63-64]. The complaint alleges that the defendant carrier is a Utah corporation doing business within the Southern District of California, Central Division [T. R. p. 55]. (In the companion case, Southern Pacific Co. is alleged to be a Delaware Corporation [T. R. p. 105].)

Statement of the Case.

This is a suit in equity to enjoin the defendant railroads from carrying into effect a provision of a union shop contract with the defendant unions which would require Appellants to become members of the defendant union as a condition of employment with the defendant carriers.

The complaint alleges that, under the Railway Labor Act prior to January 10, 1951, it was illegal for any car

rier to interfere with the organization of its employees or to coerce its employees to join, or not to join, a labor organization, and, further, that such a prohibition on the carrier was made a part of the contract of employment between the carrier and each employee; that on January 10, 1951, the Railway Labor Act was amended by the addition of Section 152 Eleventh, Title 45, U. S. C. A., which provides that any carrier and a labor organization are permitted to make agreements, requiring as a condition of continued employment that within sixty days following the beginning of such employment or the effective date of such agreement, whichever is later, all employees shall become members of the labor organization representing their craft or class under the conditions set forth in the said section; that on the 7th day of March, 1953, the defendant railroad and the defendant union entered into a collective bargaining agreement requiring union membership within sixty days as a condition of employment; that Appellant did not, within sixty days after the effective date of the said agreement, become a member of the defendant union nor did Appellant agree to pay initiation fees, dues or assessments to the said union; that arbitration proceedings were had wherein it was ruled that, since Appellant had not complied with the terms of the union shop agreement, his seniority and employment should be terminated within ten days of the date of the decision. By notice dated February 2, 1954, defendant railroad notified Appellant that effective February 5, 1954, Appellant's services with defendant railroad would be terminated because of the failure of Appellant to become a member of the defendant union; that Appellant is a member of a religious group known as the Plymouth Brethern, and Appellant's belief in the infallacy of the Scriptures

as the inspired Word of God precludes Appellant from becoming a member of or paying dues, fees or assessments into any union; that Appellant has offered to contribute to any nationally recognized charity a sum which is equivalent to the dues, initiation fees and assessments otherwise required of the members of the defendant union; that Appellant has acquired numerous benefits from thirty-seven years of seniority, including pension rights, free transportation over any railroad in the United States, Canada or Mexico and hospital and medical benefits for the rest of his life, all upon retirement at age sixty-five in the employ of defendant railroad; that Appellant is now fifty-seven years of age; that the proposed discharge will deprive Appellant of his wages, seniority rights and benefits and his right and ability to earn a livelihood in the work in which he has been trained; that a discharge is based on the authority of Section 15, Eleventh, Title 45, U. S. C. A.; that said section is unconstitutional and void; that judgment be given Appellant declaring the provisions of the Railway Labor Act, the collective bargaining agreement and the arbitration proceedings and award unconstitutional and void, insofar as they are applied to Appellant and for a permanent injunction restraining and enjoining the defendant railroad from terminating the employment and seniority of Appellant for failure to become and remain a member of, or pay initiation fees, dues and assessments to, any labor organization.

Defendant union was permitted to intervene and, on motion of the intervening defendant union, Appellant's application for injunctive relief was denied, the temporary restraining order was vacated, and motion for summary judgment was granted and the cause dismissed.

Statement of Questions Presented.

Did the District Court err in holding and concluding that Section 152 Eleventh, Title 45, U. S. C. A. was duly enacted by the Congress of the United States in the exercise of its powers to regulate commerce among the several states?

Did the District Court err in holding and concluding that the claim of Appellants that enforcement of the union shop agreement of March 7, 1953, between defendant union and defendant railroad violates constitutionally protected rights of Appellants is without merit and must be denied?

Did the District Court err in holding and concluding that the Second Amended Complaint fails to state a claim upon which relief can be granted?

Did the District Court err in holding and concluding that Section 152 Eleventh, Title 45, U. S. C. A. violates no constitutional rights of Appellants and, as a part of the supreme law of the land, it is valid and effective to authorize and permit the making of the said union shop agreement of March 7, 1953, which agreements are valid, subsistent agreements between the defendant railroad and the defendant union and must be given effect according to their terms.

I.

The Union Shop Statute Deprives Appellants of Their Right to Work and Freedom of Association Contrary to the Guarantee of the Fifth Amendment That No Person Shall Be Deprived of Liberty or Property Without Due Process of Law.

A. The Right to Work.

The due process clause of the Constitution protects an individual's right to work against federal or state legislation. The Supreme Court has made it clear that Congress, in seeking to regulate interstate commerce, under the Railway Labor Act, must, in exercising such power conform to the requirements of due process imposed by the Fifth Amendment.

Virginia Railway Co. v. System Federation No. 42
300 U. S. 515.

In several cases the Supreme Court has stated that the right to work is protected by the due process provision of the Federal Constitution. In *Yick Woo v. Hopkins*, 118 U. S. 356, the Supreme Court said:

"The very idea that one may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

In *Allgeyer v. Louisiana*, 165 U. S. 578, 589, it is said

"Liberty means not only the right of the citizen to be free from the mere physical restraint of his person, by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them

in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation . . .”

In *Truax v. Raich*, 239 U. S. 33, 41, the statement is made that:

“It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the amendment to secure.”

Accord,

Meyer v. Nebraska, 262 U. S. 390;

Pierce v. System of Sisters, 268 U. S. 510;

Takahashi v. Fish & Game Commission, 334 U. S. 410.

This constitutional right to engage in one of the common occupations of life cannot be made subject to unreasonable or arbitrary conditions. In *Smith v. Texas*, 233 U. S. 630, Smith was convicted for violation of a Texas statute making it a crime to act as a railway conductor without having first served for two years as a freight conductor or brakeman. It was conceded that Smith, through his experience in other positions, was competent to fill the position. The Supreme Court held that the statute was unconstitutional saying at page 636:

“Insofar as man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and *the constitutional guarantee is*

an assurance that the citizen shall be protected in the right to use his power of mind and body in any lawful calling." (Emphasis added.)

Union membership is just as unreasonable and arbitrary a condition of railroad employment as the qualification struck down in *Smith v. Texas*.

The right to work is a constitutional right and as such is entitled to the full protection of the due process clause of the Federal Constitution. Individuals may make private contracts and in them waive their constitutional rights, if they wish, but these same rights cannot be taken away from them by the state or federal government.

Due process requirements are met where employees are given the privilege of organizing and bargaining through their representative, provided non-union employees are not in that process deprived of the same freedom which gives rise to the rights of the majority. The freedom to join and that of not joining are correlative. It is unrealistic to claim that individual employees are free to quit their jobs if they do not wish to join the union. It is generally recognized that employees do not have the theoretical freedom to quit, especially where they are responsible for the support of a family. The end result in most cases is that the employees are deprived of religious freedom by the economic necessity of joining the union in order to keep their jobs.

B. The Right to Freedom of Association.

Appellants' freedom of association is threatened by the compulsory unionism sought to be enforced upon them under the union shop amendment. This is the factor which is critical to Appellants by virtue of their religious teach-

ings and doctrines, which hold that members of the Plymouth Brethern may not be associated in any group where there are unbelievers.

It is a fundamental right of men to organize and bargain collectively with their employer, a right which exists separate and apart from legislation. *N. L. R. B. v. Jones & Laughlin Steel Corporation*, 301 U. S. 1; *Auto Workers v. Wisconsin Board*, 336 U. S. 245. The instant case involves the converse of this right, that is, the right not to associate. All freedoms rest on choice. *If men are free to join unions, they must also be free not to join; otherwise, they have no freedom of association.*

C. Property Rights of Appellants Have Been Infringed.

Many seniority rights acquired by Appellants which are protected by the Fifth Amendment have been infringed by the union shop statute. Appellants' wages are property and, to the extent that they are forced to pay initial fees, dues and assessments to the union, they are deprived of their property. Further than this, the wages, medical benefits, pension rights, and free transportation for life are rights of property founded on contract and protected by the Fifth Amendment.

Nord v. Griffin, 86 F. 2d 481;

Primakow v. Railway Express Agency, 56 Fed. Supp. 413;

Piercy v. Louisville Railroad Co., 198 Ky. 477;

Stephenson v. New Orleans, etc. Co., 180 Miss. 147;

DeMille v. American Federation of Radio Artists, 31 Cal. 2d 139.

II.

The Union Shop Statute, Insofar as It Requires Involuntary Money Payments, Is a Deprivation of Appellants' Property Without Due Process of Law in That It Is an Exercise of the Taxing Power in Favor of Private Organizations.

Congress can require money payments only through exercise of the power of tax. This power to tax is limited by the requirement that taxes be collected only for a public purpose.

United States v. Butler, 297 U. S. 1;

Loan Association v. Topeka, 20 Wall.

Congress cannot, under the guise of a tax, accomplish that which is otherwise forbidden. *United States v. Constantine*, 296 U. S. 287. It follows that Congress cannot disguise an unlawful tax by purporting to enact it pursuant to a constitutional power other than that empowering it to levy taxes.

Insofar as the union shop statute requires that employees pay initiation fees, dues and assessments to a union, it is a requirement of money payments and unmistakably an imposition of a tax. It is a tax for the benefit of a private organization and must be held an invalid exercise of the taxing power.

III.

Appellants Are Denied Freedom of Assembly, Petition and Speech Protected by the First Amendment.

The freedoms secured by the First Amendment are entitled to a "preferred" constitutional position. *Thomas v. Collins*, 323 U. S. 516. Congress may not, in the guise of labor legislation, pursuant to its power of interstate commerce, abridge the freedoms guaranteed by the First Amendment.

Jacksonville Paper Co. v. N. L. R. B., 137 F. 2d 148, 152;

N. L. R. B. v. Virginia E. & P. Co., 314 U. S. 469, 477.

The freedom of assembly or freedom of association encompasses the right to join any private organization, including a labor union. *Thomas v. Collins*, *supra*, 323 U. S. 516. At page 532 the court said:

"The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as a part of free speech, but as a part of free assembly."

The freedom of assembly, of course, includes the freedom not to assemble, just as freedom of speech necessarily carries with it a freedom to be silent.

Board of Education v. Barnette, 319 U. S. 624, 633.

When a man is compelled to become a union member because his only alternative is to give up his means of

earning his livelihood, he can hardly be said to have joined of his own free will. Further than that, if he is required to make financial contributions to its support and maintenance, his freedom of assembly is completely destroyed.

The right to petition is also invaded. When one becomes a member of a union, he becomes associated with an organization which engages in a variety of political activity, advocating specific legislation and supporting particular candidates for office. Where membership and support are involuntary, freedom of petition is abridged because the individual is required to authorize a union to petition in his name regardless of his personal desires in the matter. Of course, the individual could quit his job to protect his right to petition for himself, but the Constitution does not require this in order to exercise a fundamental freedom.

The rights granted under the First Amendment are not absolute, but before they can be abridged, there must be a "clear and present danger" to justify infringement of these rights.

Board of Education v. Barnette, supra, at 639

United States v. Dennis, 183 F. 2d 201, 212.

IV.

**The Union Shop Statute Violates the Proscription
Against Involuntary Servitude of the Thirteenth
Amendment.**

The requirement that in order to hold his job, a man must become a union member and thereafter pay to the union such amounts as are levied in the sum of fees, dues or assessments, is involuntary servitude. The Thirteenth Amendment is directed against forced labor. It was intended to prevent a man from being compelled to work for another against his will.

Pollock v. Williams, 322 U. S. 418;

Taylor v. Georgia, 315 U. S. 25;

Bailey v. Alabama, 219 U. S. 219, 245.

A man's wages represent his physical efforts. When a man is required to make involuntary money payments to a union, he is to the extent of these payments required to deliver the fruits of his labor. For practical purposes, the labor necessary to produce the fruits for delivery to a union is being performed for the union itself, so that compulsory union membership and payment of initial fees, dues and assessments requires labor for the union. Compulsory unionism does not result in involuntary servitude to the railroad, but is involuntary servitude *to the union*. To argue that a man is always free to terminate his employment and go elsewhere, and hence there is nothing involuntary involved, is specious. The mere existence of alternatives does not mean that an unwilling selection of one course of action is not involuntary in a legal sense. When a man joins a union only because the alternative is to surrender a substantial wage, seniority and retirement benefits, his "choice" of union membership can hardly be anything but involuntary.

V.

The Union Shop Statute Was Not Enacted Pursuant to the Constitutional Power to Regulate Interstate Commerce.

In *Virginia Railway Co. v. System Federation No. 40* *supra*, 300 U. S. 515, it is said:

“The power of Congress over interstate commerce extends to such regulation of the relations of rail carriers and their employees as are reasonably calculated to prevent the interruption of interstate commerce by strikes and their attendant disorders.”

There is nothing in the title of the Act, nothing in the Act itself, that indicates that it was supposed to have any effect on interstate commerce whatsoever. The Reports of the Committee of the House and Senate do not indicate that the Amendment has any relation to interstate commerce. The Reports do not show that the Amendment is reasonably calculated to prevent the interruption of interstate commerce. The Reports do not say that state laws which the Amendment purports to set aside directly burden or obstruct interstate commerce. In short, there is nothing in the Amendment to connect the statute with the commerce power of Congress. As the Supreme Court said in *Adair v. United States*, 20 U. S. 161:

“ * * * [W]hat possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce? Such relation to a labor organization cannot have, *in itself* and in the eye of the law, any bearing upon the commerce with which the employee is connected by his labor and services. * * * H

fitness for the position in which he labors and his diligence in the discharge of his duties cannot in law or sound reason depend in any degree upon his being or not being a member of a labor organization. It cannot be assumed that his fitness is assured, or his diligence increased, by such membership, or that he is less fit or less diligent because of his not being a member of such an organization. It is the employee as a man and not as a member of a labor organization who labors in the service of an interstate carrier.' (208 U. S. at 178-179.)"

This legislation authorizing union membership is of the type of legislation held in *Railroad Retirement Board v. Alton Railroad Co.*, 295 U. S. 330, not to be a valid exercise of interstate commerce. In the *Railroad Retirement* case, *supra*, the court held that pensions were related solely to the social welfare of the worker and were too remote from being a regulation of commerce; so, in this case, the imposition of union membership is related solely to the social welfare of the labor unions and is too remote from being a regulation of commerce. The legislation is simply designed to strengthen particular claims of employees in their bargaining relationship with the employer.

It can hardly be argued that if union membership is not required as a condition of employment, the lack of compulsory union membership will interrupt, if not destroy, interstate commerce. The lack of compulsory unionism during the past twenty years has not contributed in any respect to the interruption of interstate commerce, where compulsory unionism has been prohibited by federal law.

VI.

**The Union Shop Statute Unconstitutionally Deprive
Appellants of Freedom of Religion Secured by the
First Amendment.**

We submit that the case of *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, is decisive of this case in favor of Appellants. In the *Barnette* case, *supra*, the State of West Virginia passed a law requiring pupils in public schools to salute the flag of the United States while reciting a pledge of allegiance under penalty of expulsion. Children of Jehovah's Witnesses' faith were expelled from school because they refused to salute the flag and recite a pledge of allegiance because to do so violates their religious beliefs. The Supreme Court held that the State statute requiring the salute to the flag and the recitation of the pledge of allegiance was unconstitutional as invading the right to freedom of religion and freedom of opinion in violation of the First and Fourteenth Amendments to the Constitution.

In the course of the opinion in the *Barnette* case, the Supreme Court gives several reasons why the statute is unconstitutional as applied to persons with religious principles. All of the points have striking similarity to the facts of this proceeding. The first point that the Court made was that the freedom asserted by the members of Jehovah's Witnesses did not collide with rights asserted by any other individual. That is true in the instant proceedings. The freedom asserted by the employees in this case does not collide with the rights asserted by any other individual. Any person is free to join the union if he so desires. These employees ask only that the right of freedom of religion not be interfered with. The Court noted that the behavior of the Jehovah's Witnesses

as peaceful and orderly. This is true in this case. Second, the Court in the *Barnette* case observed that the action required was not optional, it was compulsory just as in the instant proceedings. The Court emphasized the element of coercion involved. Third, the Court stated that the action requires the individual to publicly accept political ideas contrary to his beliefs where such acceptance is coerced. Likewise, in this case the action of compelling these employees to join the union is to coerce them into publicly accepting political ideas contrary to their beliefs where such acceptance is coerced. Fourth, and as an offshoot of the third point, the Court noted that the statute required affirmation of a belief and attitude of mind. In this proceeding the employees are required to publicly accept something that they do not believe in. Fifth, the Supreme Court noted in the *Barnette* case that the statute suppressed expression of opinion where there was no clear and present danger existing. The Court observed that freedom of opinion and religion cannot be impaired by a sovereign unless a clear and present danger to society exists. Certainly there is no clear and present danger existing in this case which necessitates an individual to join a particular union and thereby compromise his religious convictions. Sixth, the Supreme Court stated that the purpose of the Bill of Rights was to protect minorities from majorities and that one's right to freedom of religion may not be submitted to a vote of a majority. In sum, this means that a majority in Congress cannot interfere with these employees' right to freedom of religion. Finally, the Supreme Court observed that the sovereign cannot restrict freedom of religion except where grave interests of society must be protected. We adopt the language of the Supreme Court quoted hereafter as being particularly pertinent to this proceeding:

“If there are any circumstances which permit exception they do not now occur to us.”

The trial court was clearly in error in stating that, assuming the presence of the hand of government, still the First Amendment's guarantee of freedom of religion protects only against “prohibitions.” This conflicts with countless decisions which show that individual constitutional freedoms are protected not only against *prohibition* but also against the imposition of unreasonable and arbitrary conditions on their exercise. Two cases, of major point are *Murdock v. Pennsylvania*, 319 U. S. 105 and *Follett v. Town of McCormick*, 321 U. S. 573. In each of these, the Supreme Court struck down, as an unconstitutional invasion of freedom of religion, a local tax imposed on Jehovah's Witnesses, for distribution of literature on the streets. There was no *prohibition* involved in these cases. *Murdock* and *Follett* were free to pay the tax in question and distribute literature as they wished. The trial court in this instant case stated that no showing had been made that appellants were being discriminated against. There is no need to prove *discrimination* to prove a case of unconstitutional invasion of freedom of religion. In the *Barnette* case, *supra*, where the Supreme Court held unconstitutional enforcement of the rule requiring public school children to salute the flag, there was no discrimination in the sense referred to by the trial court. There was simply a showing of unreasonable and arbitrary consequences imposed as a result of adherence to religious tenets, and so there is in the instant case. Appellants are threatened with discharge from employment because their religious beliefs will not allow them to join and lend support in any way to an organization, including a labor organization, whose members do not share their faith. That is all that the law requires to be shown.

VII.

The Requirement of Compulsory Union Membership Pursuant to the Union Shop Statute Involves "Government Action" so as to Require Decision of the Constitutional Questions Raised.

The first ten amendments to the Constitution are a check only on the activity of Congress and are not limitations on purely private action. (*Corrigan v. Buckley*, 271 U. S. 323, 330.) This requirement does not extend to the Thirteenth Amendment's proscription of involuntary servitude, which, by definition, applies to government and private action alike.

The decision of the constitutional question raised in this case does not require a showing that the object of complaint is *solely* the action of government. The condition is satisfied by showing that private parties have been aided "in some way" by "government's thumb on the scales." (*American Communications Association v. Douds*, 339 U. S. 382, 401-402; *Civil Rights Cases*, 109 U. S. 3, 11, 17.) The points to be made in this connection are:

1. Affirmative intervention by Congress through the Railway Labor Act was and is absolutely necessary to insure against frustration of its intention of saving national uniformity for the railroads in the union shop matter.

2. The statutory position of the unions under the Railway Labor Act is such that their activities in relation to the union shop have been and are, in legal effect, actions of the federal government.

3. The union shop amendment must be considered an express decision by Congress that the union shop should prevail in the railroad industry since Con-

gress knew that the effect of the amendment would be that compulsory unionism would be imposed on the railroads of the United States, and Congress must have intended the consequences of its acts.

When Congress enacted the union shop amendment of 1951 to the Railway Labor Act, it did much more than merely remove a preexisting proscription against bargaining for a union shop. There was in existence in several states statutes expressly outlawing compulsory unionism by "right to work" laws. These state "right-to-work" statutes would have precluded the unions in the railroad industry from demanding that the railroads sign a system-wide union shop agreement. If the Railway Labor Act said nothing about the union shop, these state laws would unquestionably be applicable. To take precedence over state law affirmative congressional action in favor of the unions was necessary. It was necessary to carry out the intent of congress to put the unions in a position to bargain for union shop agreements valid in all of the forty-eight states. By express terms, the 1951 amendment purports to take precedence over all state laws to the contrary. The purpose of Congress to supersede state law applied not only to "right to work" laws in existence at the time of its amendment, but also to those which might subsequently be enacted. Thus, the effect was actually felt in all states. In those having "right to work" laws, the laws were swept aside with respect to railroad employees. In other states, the legislators were told that they could not pass "right to work" laws applicable to railroad employees. It is not within the power of private parties to modify state laws; only an act of Congress can do so. It cannot be denied that such far-flung exer

tion of sovereign power constitutes "government action" by Congress.

Consideration of the statutory position of the modern labor union has led a number of courts to consider the role which Congress has given them when constitutional issues have been raised. It is settled law that where a labor union, organized and functioning pursuant to authority of statute, performs certain acts which the statute directs or permits, what it does partakes, in legal effect, of the nature of governmental action. In *American Communications Ass'n v. Douds*, 339 U. S. 382, 401-402 (1950), the Supreme Court said of actions of a labor union certified under the National Labor Relations Act as an exclusive bargaining agent:

"Power is never without responsibility. And when authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin in some respects, to its exercise by Government itself."

In *Steele v. Louisville & Nashville Railroad Co.*, 323 U. S. 192 (1944), it was argued to the Supreme Court that a collective bargaining agreement secured by the Brotherhood of Locomotive Firemen and Enginemen was unconstitutional because it discriminated against Negroes. The Court said:

"* * * [The labor union] representative is clothed with power not unlike that of a legislature which is subject to constitutional limitations on its power to deny, restrict, destroy or discriminate against the rights of those for whom it legislates and which also is under an affirmative constitutional duty equally to protect those rights." (323 U. S. at 198.)

This quotation unmistakably recognizes that when legislative body like Congress vests power and authority in groups or associations like defendant unions, the actions of the latter are to be judged as tantamount to those of the legislature. So, in this case, Congress swept aside state laws to vest in railroad unions power to demand and get contracts requiring union membership as a condition of employment. It is, therefore, impossible to conclude that there is no "government action" in this case.

The Supreme Court has several times spoken as to what constitutes "State action" sufficient to raise constitutional questions under the Fourteenth Amendment. We must take it that its words would be equally applicable in determining what constitutes Congressional action as to require decision of constitutional issues raised under the first ten Amendments. In a leading case, the Court said that questioned action must be "sanctioned *in some way* by the State, or * * * done under State authority in the shape of *laws, customs, or judicial or executive proceedings*" to raise a constitutional issue under the Fourteenth Amendment. (Emphasis supplied.) (*Civil Rights Cases*, 109 U. S. 3, 11, 17 (1883).) These statements were expressly reaffirmed very recently in *Shelley v. Kraemer*, 334 U. S. 1, 14 (1948).

Surely, in the case at bar, the union demands for union shop have been "sanctioned in some way" by Congress. Their demands have clearly been made pursuant to Congressional authority in the form of the Union Shop Statute coupled with the other provisions of the Railway Labor Act which vest in the unions the exclusive bargaining position they occupy and which command railroad to bargain with them. And, it cannot be controverted

that the union demands have been sanctioned by "executive proceedings" in the form of the hearings before and report of Emergency Board No. 98 expressly *recommending* that the nation's railroads sign union shop agreements with appellant unions.

In *Steele v. Louisville & Nashville Railroad Co.*, *supra*, the Supreme Court said:

"If the Railway Labor Act purports to impose on petitioner and the other Negro members of the craft the legal duty to comply with the terms of a contract whereby the representative has discriminatorily restricted their employment for the benefit and advantage of the Brotherhood's own members, *we must decide the constitutional questions, which petitioner raised in his pleading.*" (Emphasis added.) (323 U. S. at 198-199.)

To comply with the unequivocal meaning of the quoted language from the *Steele* case, this court must pass upon the constitutional questions raised.

This Court cannot overlook the additional fact that Congress has spelled out the particular type of union shop that is permissible. It has not permitted the parties to enter into their own form of union shop agreement or a type of union shop agreement which may be lawful within the various states at common law or by statute. Consequently, it is Congress that is sanctioning the particular type of union shop agreement involved in this proceeding.

That the unions, shortly after enactment of the Union Shop Statute, would demand and obtain union shop contracts across the country was pointedly forecast by labor leaders as well as representatives of management. George M. Harrison, union official, appeared before the Sub-

committee of the Committee on Labor and Public Welfare United States Senate, in support of the Amendment. After conceding that there were approximately 280,000 to 350,000 employees on the railroads who were not union members, the following colloquy ensued:

“Senator Donnell: They are not in the unions to this time?”

Mr. Harrison: That is right.

Senator Donnell: So, if this bill is passed, somewhere around, we will say, in round figures, 300,000—ranging from 280,000 to 350,000—people who thus far have not joined the union will find themselves confronted by a bill whose first purpose is, according to your statement, to cause every employee to become obligated to join the union. That is right, is it not?

Mr. Harrison: That is right.” (*Hearings before Subcommittee of the Committee on Labor and Public Welfare on S. 3295, 81st Cong., 2d Sess., 2 (1950).*)

Jacob Aronson, Vice President and General Counsel of the New York Central Railroad Co., stated that:

“If this bill is enacted into law, it means that every railroad employee * * * must join the union and pay dues and continue to be a member in good standing in order to hold his job.” (*Id.*, 152.)

Paul J. Neff, Chief Executive Officer of the Missouri Pacific Railroad, made the practical aspects of the statute plain:

“I note in this bill the words ‘shall be permitted—(a) to make agreements.’ The words might just as well be written ‘railroads shall be required to make agreements.’ Certainly there can be no doubt that

economic pressure would be applied in the usual way if the word 'permitted' is used." (*Id.*, 190.)

R. H. Smith, President of the Norfolk & Western Railway Company said:

"If Senate bill 3295 becomes a law, the labor organizations would undoubtedly present and prosecute on a Nation-wide basis demands for union shop and the check-off, or automatic deduction from employees' pay of union dues, fees, and assessments. Experience in recent years and the known fact that the railroad labor organizations have requested this enabling legislation demonstrate that they would push their demands to the point of finally resorting to their economic strength and the strike weapon to enforce their demands. *Thus, enactment of the bill would be practically equivalent to establishment of the union shop with a check-off system on all railroads.*" (Emphasis supplied.) (*Id.*, at 176.)

Emergency Board No. 98 was created to consider the union demands for union shop contracts in light of the amendment and recommended that the Nation's railroads accede to those demands. Referring to the hearings before committees of Congress which preceded enactment of the Amendment, the Emergency Board itself said:

"* * * [I]t was specifically and emphatically advised by several of the Carrier spokesmen that passage of the amendment would mean enactment of the union shop for the whole industry. And even if these statements were to be discounted as advocacy, *Congress was in no doubt as to the intention of the unions to press vigorously for the union shop on a national basis. Congress cleared the path for such uniform national treatment of the issue by enacting that State laws against compulsory unionism should*

not stand in the way of agreements on the railroads—departing in this respect from the model of the Taft-Hartley legislation. But Congress did not stop there. *It provided detailed terms on which union-shop agreements might be made*, dealing not only with the problem of discrimination and arbitrary union action against members but also, in careful detail, with the problem of dual membership in the operating phase of the industry. And all this Congress did with thorough knowledge of the facts concerning the current status of the unions on the railroads. * * * (Emphasis supplied.) (Report of Emergency Board No. 98, February 14, 1952, 11-12.)

These quotations demonstrate that Congress knew what the consequences of the union shop amendment to the Railway Labor Act would be and what its purpose was. Congress knew that all non-operating employees of the National railroads would be faced with the alternative of joining and paying their money to the union or lose their job. No conclusion can be reached but that Congress intended that result and that its hand is unmistakably involved in this case.

Conclusion.

For the reasons set forth herein, it is respectfully submitted that the order and judgment denying a preliminary injunction and granting summary judgment and dismissal of the above entitled cause should be reversed. May, 1955.

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE C. WICKS, *Plaintiff and Appellant*

v.

SOUTHERN PACIFIC COMPANY (PACIFIC LINES),
Defendant and Appellee

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Intervenor and Appellee

PHILIP F. JENSEN, *Plaintiff and Appellant*

v.

UNION PACIFIC RAILROAD COMPANY, a Corporation,
Defendant and Appellee

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT
HANDLERS, EXPRESS AND STATION EMPLOYEES,
Intervenor and Appellee.

On Appeal From Final Order Denying Injunction and Granting
Summary Judgment and Dismissal

BRIEF OF INTERVENORS-APPELLEES

(Signatures on Inside Cover)

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Intervenor and Appellee.

**On Appeal From Final Order Denying Injunction and Granting
Summary Judgment and Dismissal**

BRIEF OF INTERVENORS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division, denying Plaintiffs'-Appellants' application for injunctive relief, vacating a temporary

restraining order, and granting Intervenor's-Appellees motion for summary judgment and dismissing the action (R. 90).

Pursuant to stipulation of the parties, this Court ordered on February 18, 1955 that because the appeals in both the Wicks and Jensen cases presented identical questions of law arising out of ultimate facts identical in nature,¹ that one printed record be filed, one oral argument be heard and the parties file separate or consolidated briefs (R. 3, 5). Pursuant to said order this brief is filed jointly on behalf of the two railroad labor organizations who were intervening Defendants in the court below and are Appellees here.²

Because in our view Appellants do not accurately represent to this Court the true nature of the judgment below and the real questions presented by this appeal, nor do they adequately present the facts and pleadings, we feel that a restatement of the case is required.

RESTATEMENT OF THE FACTS AND PLEADINGS

In the action below Appellants sought to enjoin the defendant Railroads from terminating their employment pursuant to provisions of union shop agreements between the defendant Railroads and the intervening Defendant labor organizations³ on the ground that said agreements and the provisions of the Railway Labor Act under which they were made were unconstitutional and void (R. 55, 64).

The material facts as disclosed by the amended complaint in the Jensen case (R. 55) and the affidavit attached

¹ The few minor factual differences between the Wicks and Jensen cases none of which are of substance, are set forth in the Transcript of Record pages 104-107.

² Also pursuant to this stipulation only the record in the Jensen case was printed.

³ For convenience and brevity the defendants Union Pacific Railroad and Southern Pacific Company will be referred to herein as the Railroads and the intervening appellee labor organizations as the Brotherhoods.

to the Brotherhoods' motion for summary judgment (R. 21) are undisputed. A brief summary of these facts follows:

On March 7, 1953, defendant Union Pacific Railroad and the Brotherhood of Railway and Steamship Clerks, together with other railroad labor organizations representing non-operating employees, entered into a union shop agreement which became effective on March 31, 1953. A copy of this agreement is set forth in the Transcript of Record as Exhibit B to the Brotherhoods' affidavit (R. 36). The union shop agreement was made pursuant to express provision contained in Section 2 Eleventh of the Railway Labor Act, as amended on January 10, 1951 (45 U.S.C.A. Sec. 152 Eleventh).⁴

At the time the union shop agreement was made and on its effective date, Appellant Jensen was employed by the defendant Railroad in a clerical position in the craft or class for which the Brotherhood is the duly designated and authorized collective bargaining representative under the Railway Labor Act.

The union shop agreement provides in part that, subject to certain terms and conditions, all employees as a condition of their continued employment shall "become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first perform compensated service as such employees after the effective date of this agreement, and thereafter shall maintain membership in such organization;" (R. 36).

On the same date that the union shop agreement was executed, the Brotherhood and the Railroad entered into another agreement known as a Memorandum Agreement, also effective on March 31, 1953, and set forth in the Record as Exhibit C to the Brotherhoods' affidavit (R. 48). This Memorandum Agreement provides that any employee in

⁴ The pertinent provisions of Section 2 Eleventh will be set forth *infra* under the Statement of the Statute Involved.

the service on the date of the said agreement who is not a member of the union representing his craft or class, and who will make affidavit that he was a member as of the date of the agreement of a bona fide and recognized religious group having scruples against joining a union, will be relieved of the obligation to join the Brotherhood and execute the oath of membership, and will be deemed to have met the requirements of the union shop agreement by the payment of an amount equivalent to the initiation fees, periodic dues, and assessments required for membership by the organization representing his craft or class. As stated in the Brotherhoods' affidavit (R. 23) and as admitted in the amended complaint (R. 59), Appellant failed and refused to comply with either the terms of the union shop agreement or the Memorandum Agreement, assigning as his reason therefor religious beliefs incompatible with their requirements.

Pursuant to the provisions of the union shop agreement the Brotherhood notified the railroad of the Appellant's non-compliance and requested the termination of his employment. Appellant was granted a hearing and all appeal procedures provided by Section 5 of the agreement (R. 38-42), the final step of which was a decision of a neutral arbitrator appointed by the National Mediation Board. This decision was rendered on January 27, 1954, by Arbitrator Edgar L. Warren who found that Appellant had not complied with the terms of the union shop agreement and held that in accordance with its requirements Appellant's seniority and employment would be terminated within ten days from the arbitrator's decision. A copy of the opinion and award of the arbitrator is set forth in the Transcript of Record as Exhibit A to the Brotherhoods' affidavit (R. 25-35). On February 2, 1954, the Railroad notified Appellant that effective February 5, 1954, his employment would be terminated (R. 60), whereupon the action was instituted by the filing of a complaint in the District Court (R. 6).

A motion for summary judgment was filed (R. 20) to which affidavits and exhibits were attached (R. 21-50) upon which comment has been made above. In support of the motion for summary judgment the Brotherhood took the position that if the action could be deemed to present a substantial federal question it was one upon which hearing and determination by a three-judge court was required, but if the claim was insubstantial and lacking in merit, as contended by the Brotherhood, it was subject to dismissal by a single judge.

The Railroad filed an answer to the complaint in which it denied the allegations of unlawfulness and illegality and requested dismissal of the action (R. 66-71).

OPINION BELOW

On May 26, 1954, District Judge Ben Harrison filed a written opinion (R. 74-81) in which he concluded that there was no substantial constitutional question presented requiring a three-judge court and determined that the applications for injunctive relief should be denied, the temporary restraining order vacated, and the motions for summary judgment granted. 121 F. Supp. 454. Pursuant to his opinion, findings of fact and conclusions of law, as amended (R. 81-89), together with a judgment of dismissal (R. 90-91), were entered on June 10, 1954.

RESTATEMENT OF JURISDICTION

Although Appellants state in their brief (p. 1) that this Court has jurisdiction of the appeal by virtue of Section 1292, Title 28 U.S.C.A., authorizing appeals from interlocutory orders of district courts, we believe the nature of the judgment below is such that jurisdiction is properly predicated upon Section 1291 of Title 28, U.S.C.A. which establishes jurisdiction in the Court of Appeals of all final decisions of district courts.

RESTATEMENT OF QUESTIONS INVOLVED

Appellants' statement of the questions presented on this appeal (p. 5) is so worded as to imply that this Court is called upon to pass upon the constitutional questions which Appellants sought to litigate below. This is confirmed at another point in Appellants' brief (p. 23) where discussion of a contention and quotation from a decision is followed by the statement that "this court must pass upon the constitutional questions raised."

Such a presentation of the questions involved misconceives the opinion and judgment below as well as the jurisdiction which this Court can exercise on this appeal. The review here permitted by statute is confined to a determination of whether the District Court was correct in concluding that the constitutional questions sought to be raised were so insubstantial as not to warrant the establishment of a three-judge court.⁵ If this Court agrees with that judgment it may affirm, but if it disagrees it does not possess the jurisdiction to do more than remand the case with directions to convene a three-judge court to consider the constitutional questions presented. Any injunction based upon the alleged unconstitutionality of the union shop amendment to the Railway Labor Act would enjoin the "operation" of an Act of Congress for repugnance of the Constitution of the United States, and, as such, would be subject to the requirements of Title 28 U.S.C.A., Sections 2282 and 2284. *Coffman v. Breeze Corporations, Inc.*, 323 U.S. 316, 317 n. 1.

For these reasons, we think a proper statement of the questions involved on this appeal is as follows:

⁵ Appellant not only applied for a three-judge court (R. 65) which the District Court denied (R. 81, 88), but he also notified the United States Attorney General (R. 103) of his challenge to the constitutionality of the union shop amendment to the Railway Labor Act, as required by statute. The disinclination of the Attorney General to intervene in this proceeding upon reading the opinion below and transcript of record can only be attributed to his conclusion that Appellants' contentions are either frivolous or clearly insubstantial.

1. Whether the District Court was correct in holding that the claim that the union shop amendment to the Railway Labor Act and the union shop agreement made pursuant thereto are unconstitutional fails to present a substantial federal question and is therefore subject to dismissal by a single judge?

2. Assuming, *arguendo*, that the claim of unconstitutionality presents a substantial federal question, whether the action is subject to hearing and determination only by a statutory three-judge court?

STATUTE INVOLVED

Section 2 Eleventh of the Railway Labor Act, which was added by a 1951 amendment (45 U.S.C.A. 152 Eleventh), in pertinent part provides as follows:

“Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—

“(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

“(d) Any provisions in paragraphs Fourth and Fifth of Section 2 of this Act in conflict herewith are to the extent of such conflict amended.” Railway Labor Act, Section 2 Eleventh; 64 Stat. 1238, U.S.C. Title 45, Section 152 Eleventh.)

ARGUMENT

I.

The Asserted Unconstitutionality of the Union Shop Amendment to the Railway Labor Act and the Union Shop Agreement Is Obviously Without Merit, and the District Court Was Clearly Correct in Dismissing the Complaints for Failure to Present a Substantial Federal Question.

At the outset of this Argument it should be noted that although the Court below filed a written opinion (R. 74) 121 F. Supp. 454, which carefully considered and answered each of the contentions urged by Appellants in this Court no mention or discussion of that Opinion is made by Appellants in their brief. Moreover, there is likewise no mention nor discussion of the decision of the U.S. Court of Appeals for the Second Circuit in *Otten v. Baltimore & Ohio R. Co.*, 205 F. 2d 58, in which case identical issues to those here presented were decided adversely to Appellants.

The sole ground upon which the complaints filed in the District Court sought to enjoin Appellee Railroads from terminating Appellants' employment was the alleged unconstitutionality of the Union Shop Amendment to the Railway Labor Act (45 U.S.C.A. Sec. 152 Eleventh) and the union shop agreement made pursuant thereto. (R. 36) As set forth above in our Statement of the Facts and Pleadings, the complaint sought the issuance of injunctions, preliminary and permanent, enjoining the termination of Appellants' employment and seniority because of such alleged unconstitutionality. Although, as we shall later show, federal law requires hearing and determination

by a statutory three-judge court before such relief may be granted, it is well established by decisions of the Supreme Court of the United States that it is the duty of a single District Court judge first to determine whether the constitutional issue sought to be presented is substantial before invoking the three-judge court procedure. If the constitutional issue is determined not to present a substantial federal question a single district judge may deny the relief sought. Such ~~unconstitutionality~~ ^{INSUBSTANTIALITY} may be apparent because the asserted unconstitutionality is either "frivolous" or "obviously without merit". *William Jameson & Co. v. Morganthau*, 307 U.S. 171; *California Water Service Co. v. The City of Reading*, 304 U.S. 252; *Ex Parte Poresky*, 290 U.S. 30.

The District Court adopted this view when it held as a matter of law (R. 88) that since the allegations of Plaintiffs' amended complaint failed to present any substantial ground for granting the injunctive relief requested, the statutory three-judge court procedure was not applicable. In so holding Judge Harrison relied in his opinion (R. 77, 87) on an identical determination in an opinion by Judge Learned Hand of the United States Court of Appeals for the Second Circuit in *Otten v. Baltimore & Ohio R. Co.*, 205 F. 2d 58.

It is our position that an analysis of the allegations of the amended complaint (R. 55-65) and of the statutory and constitutional provisions invoked clearly shows that the constitutional questions raised are entirely lacking in substance. The action of the Appellee Railroads which Appellants seek to have enjoined is the operation and performance of agreements between the Railroads and the Brotherhoods. Examination of the statutory provisions which expressly authorize such agreements plainly discloses the lack of merit in the asserted unconstitutionality. Prior to 1951 Section 2 Fifth of the Railway Labor Act (45

U.S.C.A. Section 152 Fifth) prohibited union shop agreements. By Section 2 Eleventh, enacted in 1951, this prohibition was repealed so that union shop agreements may now be made in the railroad industry within limitations prescribed by the Statute. Consequently Appellants' contention that the Union Shop Amendment is unconstitutional amounts to no more than a claim that they have a constitutional right to have Congress continue to prohibit such agreements. Such a claim is clearly without substance or merit. This was the precise holding of the United States Court of Appeals for the Second Circuit, in *Otten v. Baltimore & Ohio R. Co.*, 205 F. 2d 58 decided on June 8, 1955. In that case, the facts of which are almost identical to those here presented, Judge Learned Hand reasoned that the enactment of the Union Shop Amendment to the Railway Labor Act amounted to a repeal of the pre-existing prohibition of union shop agreements in Section 2 Fifth, and that "there can be no plausible argument that to repeal such a statute was unconstitutional" (p. 60). Judge Harrison expressly agreed with and adopted this holding in the Opinion filed below (R. 78).

It is true that Judge Hand went on to say that the Union Shop Amendment in 1951 might be said to have affirmatively legalized union shop agreements if the were invalid at common law, and that under such circumstances a challenge to the constitutionality of the amendment might not be considered "insubstantial". However, he further reasoned that such a possibility was not involved so far as the State of New York was concerned because of the fact that union shop agreements were valid under the common law of New York. As Judge Harrison points out in the Opinion of the District Court (R. 77) there is likewise no prohibition at common law in California of union shop agreements. *Colgate Palmolive-Peet Co. v. National L.R. Bd.*, 338 U.S. 355, 361

J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 98 Pac. 1027; *Schafer v. Registered Pharmacists Union*, 16 Cal. 2d 379, 106 P. 2d 403; *James V. Marinship Corp.*, 25 Cal. 2d 721, 155 P. 2d 329.

Accordingly the decision of the District Court here, as in the *Otten* case, was clearly correct in holding that the asserted unconstitutionality of the federal law is obviously without merit because there is no common law prohibition of union shop agreements in California which the federal law can be said to supersede,⁶ even though it is quite clear on the face of the statute that any such law, if it existed, has been superseded.

We submit that the foregoing is a sufficient answer to the contentions advanced by Appellants in the first six sections of their argument to this Court (Appellants' Br. pp. 6-18) with respect to the asserted unconstitutionality of the Union Shop Amendment to the Railway Labor Act.

In the last section of their argument (Appellants' Br. pp. 19-26) Appellants attempt to show that the union shop agreements, as distinguished from the statutory provisions authorizing them, are unconstitutional on the theory that they involve "Government Action". This contention is as untenable as the asserted unconstitutionality of the Statute itself. The Federal Constitution does not confer upon an individual any right to employment. In the absence of statutory or contractual restrictions, an employer is free to terminate an employee's services for any reason since he has an undisputed right at common law to hire and dis-

⁶ In this connection Judge Harrison pointed out in his Opinion for the District Court (R. 77-78) that certain holdings of the state courts in Texas and Nebraska to the effect that the Union Shop Amendment to the Railway Labor Act was beyond the legislative power of Congress have not been overlooked but that he was not in accord with the views stated in those decisions because "of the difference in the laws of the states involved, assuming that the state laws can control an act of Congress in this field".

charge at will. Constitutional guarantees of individual freedom of religion, due process, and the like are directed exclusively to preventing infringement by the Government. It is too well established to require extended discussion that such constitutional rights have nothing to do with limitations which may be imposed on personal freedom by action of employers or as a result of contracts between private parties. *Corrigan v. Buckley*, 271 U.S. 323, 330; *Shelley v. Kraemer*, 334 U.S. 1, 9; *Public Utilities Commission v. Pollak*, 343 U.S. 451, 461-462; *Denicke v. Brigham*, 142 F. 2d 221, 224, and cases cited therein, fn. 9 (9th Cir.).

In an obvious effort to avoid the well established law of these decisions, Appellants seek to establish that the actions of the Brotherhoods in making union shop agreements with the Railroads "are, in legal effect, actions of the Federal government." In short it seems to be Appellants' contention that the Brotherhoods are exercising delegated legislative authority when they contract with Railroads for a Union Shop. In support of this contention the Appellants rely exclusively upon isolated quotations from the decisions of the Supreme Court in *American Communications Assn. v. Douds*, 339 U.S. 382 (a non-Communist Affidavit case) and *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, together with certain quotations from the legislative history of the Union Shop Amendment.

The statements from the legislative history quoted by Appellants (pp. 24-25) are designed to show that it was the intention of the Unions, if they were successful in obtaining legislation authorizing a Union Shop in the railroad industry, to press vigorously for the adoption of agreements on a national basis. We readily concede that such was the Unions' objective and that it has been successful. But we fail to see any possible basis for Appellants' conclusion that by virtue of this objective and its fulfillment the Unions are exercising delegated legislative power.

Appellants' reliance upon certain quotations from the *Doubs* and *Steele* cases is similarly specious. In the *Steele* case the Supreme Court held that a union organization chosen under the Railway Labor Act to represent the employees of a given craft or class had the obligation in collective bargaining and in making contacts with a carrier to represent *all* members of the craft without hostile discrimination because of race or color. The Court held this obligation to arise from the Statute itself as an implied condition of the congressional grant of authority to represent a craft and to make contracts as to the wages, hours, and working conditions of its members. 323 U.S. 192, 203-204.

In the course of its opinion, the Court pointed out (p. 202) that while the majority of the craft chooses the bargaining representative, the Railway Labor Act requires by its terms that all of the craft—not simply the majority—are to be fairly represented. The Court likened the obligation thus created by Statute to the duty which the Constitution of the United States imposes upon a legislature to give equal protection to the interests of those for whom it legislates. It reasoned (p. 198) that to interpret the Railway Labor Act as empowering a bargaining representative to discriminate arbitrarily against negro members of the craft would raise constitutional objections not otherwise involved. But the Court then proceeded to state that the constitutional questions did not arise because of its conclusion that the Railway Labor Act itself not only authorized a labor union chosen by a majority to represent the entire craft, but also imposed a corresponding obligation to protect the rights of the minority of the craft (p. 199).

These references in the Court's opinion to the Constitution and the analogies made by the Court to the obligations of a legislature to give equal protection to the interests of

all for whom it legislates are seized upon by Appellant as establishing the proposition that the Brotherhoods are necessarily exercising delegated legislative power when they make union shop agreements pursuant to the authority contained in Section 2 Eleventh of the Railway Labor Act. Such a conclusion is a complete *non sequitur* for several reasons.

It is one thing to say that the authority derived from statute by a union chosen by a majority to represent minority as well as majority is not unlike the authority of a legislature in terms of the obligation imposed upon both to treat fairly all those for whom it acts. It is quite another thing to say that the bargaining representative thereby becomes the alter ego of the Congress when it enters into an agreement with an employer. The Supreme Court said no such thing in the *Steele* case. It simply said that an unrestricted grant of authority to a representative chosen by a majority arbitrarily to ignore or obliterate the rights of a minority would raise constitutional objections to the authority thus granted. It did not say that the action of the representative in making contracts with the carrier with respect to rates of pay, rules or working conditions amounted to the exercise of delegated legislative authority. Similarly, if the Union Shop Amendment to the Railway Labor Act authorized bargaining representatives who would arbitrarily exclude negroes from membership to make union shop agreements which at the same time would require the termination of the employment of the excluded employees for failure to obtain membership, constitutional objections to the authority thus granted would be raised. But the simple act of a union making an agreement with a carrier is nonetheless the action of private parties and does not amount to the exercise of delegated legislative power.

In short it is the legislative creation of the right which is subject to constitutional requirements—not the manner of its exercise. If the legislatively created right is constitutional, excesses in its exercise are subject to the restrictions of the statute. This very reasoning was applied by the Supreme Court in its decision in the *Steele* case.

Similarly, in the *Douls* case Appellants stop too short when they quote (Br. p. 21) from the Court's Opinion (p. 401) that "when authority derives in part from Government's thumb on the scales the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by government itself." The Court very carefully restricted any such inference as Appellant seeks to draw when it went on to state in the very next sentence immediately following that quoted by Appellants (p. 402):

"We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board *become Government agencies or may be regulated as such*. But it is plain that when Congress clothes the bargaining representative 'with powers comparable to those possessed by legislative body both to create and restrict the rights of those whom it represents,' [citing *Steele v. Louisville & Nashville R. Co.*] the public interest in the good faith exercise of that power is very great". (Italics supplied)

We think it is well established that when Congress undertakes to regulate collective bargaining in interstate commerce by prescribing procedures for the conduct of such bargaining providing merely for the regulation of disputes, and imposing upon carrier and employees the obligation to bargain with each other, it is not delegating legislative power. The legislative power has been fully exercised. It seems to us frivolous to suggest that bargaining between railroad unions and the carriers with respect to rates of pay, rules or working conditions in terms of whether wages should be increased or reduced, or whether longer or shorter hours should be sought, involves

the exercise of legislative power. The making of a union shop agreement is in exactly the same category. Subject to such restrictions as Congress may have imposed by its legislation, the action of employers and employees in negotiating conditions of their employment constitutes simply the exercise of the basic right of private parties to contract. This is true whether the contractual authority is exercised by a collective representative or left to individuals, or whether the subject matter of the contract is wages, hours, a union shop, or any other condition of employment.

For these reasons we submit that the union shop agreement here involved is a contract between private parties and as such can not violate constitutional rights of individual freedom of religion, due process, and the like, which are guarantees exclusively against infringement by the Government.

Consistent with the argument above advanced in Answer to Appellants' reliance upon the *Steele* and *Doud* decisions is a similar rejection by Judge Learned Hand in the *Otten* decision. In that case, as here, Plaintiff was a member of the "Plymouth Brethren" religious group. In referring to the requirements of the union shop agreement on the Baltimore & Ohio Railroad, Judge Hand pointed out (205 F. 2d 58 at 61) that the Union had not excluded the plaintiff but, on the contrary, had "made substantial concessions to induce him to join". For this reason he found the Supreme Court's decision in the *Steele* case, where Steele had been excluded, to be totally inapplicable. He also stressed the fact that the sanctions being imposed were not political or governmental in nature. He added (p. 61):

"The First Amendment protects one *against action by the Government*, though even then, not in all circumstances; [citing *Reynolds v. U.S.*, 98 U.S. 145] but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities." (Italics supplied.)

The terms of the union shop agreement here involved, if strictly adhered to, would have required Appellants to join the Brotherhoods and execute the oath of membership as a condition of their continued employment. However, the Brotherhoods did not see fit to enforce strict adherence to the terms of the Agreement in connection with those who hold bona fide religious beliefs incompatible with such membership. In an effort to make it possible for Appellants and others like them to continue in employment without offending their religious scruples, the Brotherhoods sought to make special arrangements for them. They did not feel that they could, in fairness to all other employees in the crafts which they represented who were required by the union shop agreement to assume all the obligations of membership, wholly exempt Appellants from all obligations. As shown by the Exhibit attached to the Brotherhoods' affidavit set forth as Exhibit C in the Transcript of Record (R. 48), Appellants and other members of bona fide religious sects holding similar views were exempt from all requirements of membership except the payment of amounts equivalent to initiation fees, dues and assessments. In short, all Appellants were required to do—which the Brotherhoods did not feel was incompatible with their religious beliefs—was to share with their fellow employees the costs of providing representation for all members of the crafts. With specific reference to this phase of the case, and by way of additional answer to Appellants' argument even assuming the presence of congressional action as contended in the last section of Appellants' brief, Judge Harrison had the following to say in the opinion below: (R. 8-79)

“Assuming by way of argument that there were congressional action present here, still the protection of the First Amendment could not be validly invoked by these plaintiffs. That amendment protects against prohibitions. This feature of the case is similar to a case recently decided by the Court of Appeals for the Seventh Circuit. [*Mitchell v. Pilgrim Holiness Church*

Corp., 210 F. 2d 879 (1954); (cert. applied for 22 Law Week 3296).]⁷ In that case a group engaged in religious work claimed to be exempt from the coverage of the Fair Labor Standards Act on the ground that to subject it to the Act would be to prohibit the free exercise of religion. This claim was rejected, the Court saying: 'We think that all of the above cases on which the Defendant relies [cases in fact involving prohibitions on the free exercise of religion] are distinguishable from the instant case. The Act does not in this case prohibit the free exercise of religion. * * * ' Nor can it be said that the plaintiffs' right to worship as they see fit has been prohibited or restricted before this court.'

II.

Assuming, Arguendo, That the Claim of Unconstitutionality Presents a Substantial Federal Question, Hearing and Determination Only by a Statutory Three-Judge Court Is Required.

If, as we have previously indicated in our restatement of the case, this Court should regard the constitutional questions raised as substantial, hearing and determination before a three-judge court is required. We do not consider this point to be disputed by Appellants in view of their application below for a three-judge court (R. 65), and we raise it simply because of the fact that in their brief Appellants appear to be asking this court affirmatively to pass upon the merits of their contentions that the Union Shop Amendment to the Railway Labor Act and the agreements made pursuant thereto infringe constitutional rights. In any event it is clear that such consideration is subject to the requirements of Sections 2282 and 2284 of Title 28 U. S. Code, because an injunction based upon the alleged unconstitutionality of the Union Shop Amendment would enjoin the "operation" of an Act of Congress as repugnant to the Constitution of the United States, *Coffman v Breeze Corporations Inc.*, 323 U. S. 316, 317, n. 1.

⁷ On June 7, 1954, the United States Supreme Court denied certiorari. 347 U.S. 1013, 98 L. Ed. 1136.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

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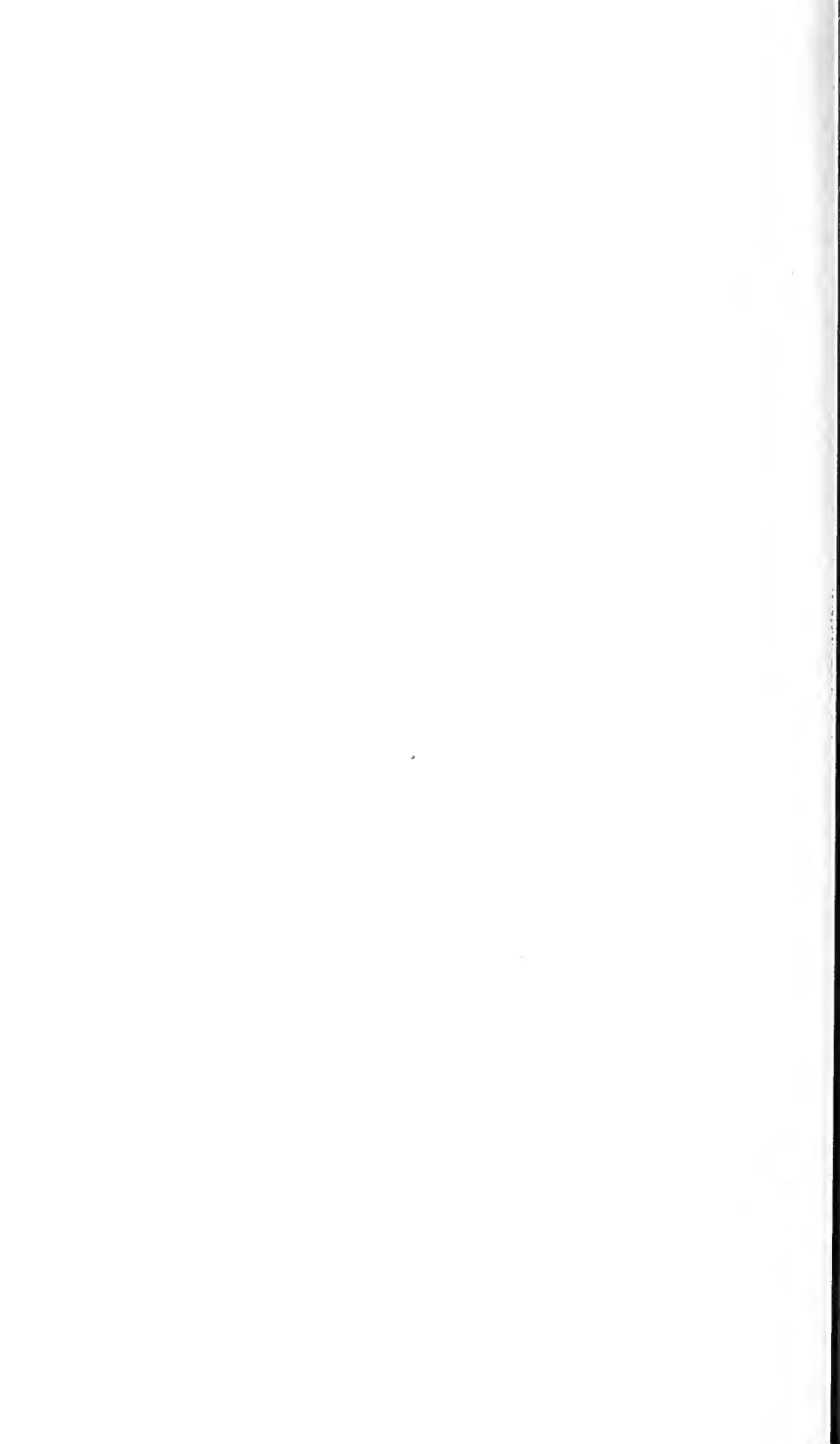
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Dated at Washington, D. C.
July 11, 1955.



IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE C. WICKS,

Plaintiff and Appellants,

vs.

SOUTHERN PACIFIC CO. (Pacific Lines),

Defendant and Appellee,

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,

Intervenor and Appellee.

PHILIP F. JENSEN,

Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD CO., a corporation,

Defendant and Appellee,

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

Intervenor and Appellee.

On Appeal From Order Denying Preliminary Injunction and
Order Granting Summary Judgment and Dismissal.

APPELLANTS' REPLY BRIEF.

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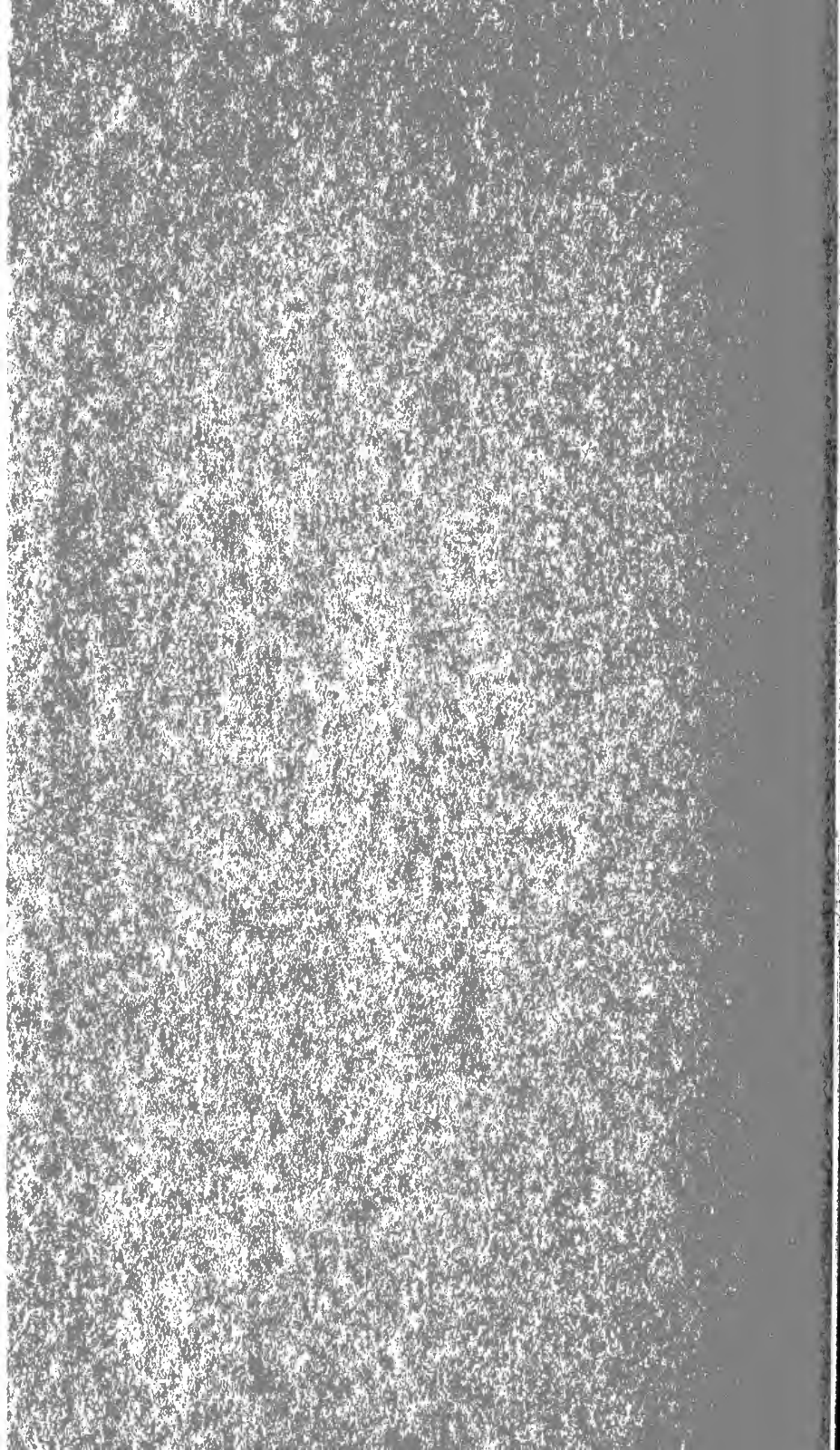
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PAUL P. O'BRIEN, CLERK



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Nos. 14483-84

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE C. WICKS,

Plaintiff and Appellants,

vs.

SOUTHERN PACIFIC CO. (Pacific Lines),

Defendant and Appellee,

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES,
Intervenor and Appellee.

PHILIP F. JENSEN,

Plaintiff and Appellant,

vs.

UNION PACIFIC RAILROAD CO., a corporation,

Defendant and Appellee,

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS,
FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,
Intervenor and Appellee.

On Appeal From Order Denying Preliminary Injunction and
Order Granting Summary Judgment and Dismissal.

APPELLANTS' REPLY BRIEF.

Statement.

Appellees have recast and reduced Appellants' statement of questions involved from seven to two. Actually, the statement of questions involved can be reduced to one question containing several subsidiary questions. The ultimate question to be determined by this court is whether or not Appellants' claim of unconstitutionality as alleged in the complaint presents a substantial federal question

which requires a hearing and determination by a three-judge court. The principal subsidiary question to be determined by this court is whether or not "government action" is involved so as to require decision as to whether or not constitutional rights of Appellants have been violated. Assuming that "government action" is found to exist in this case, the constitutional rights which Appellants assert have been violated are based on the First, Fifth and Thirteenth Amendments of the United States Constitution and constitute a denial of freedom of assembly, petition, speech and religion, a denial of liberty and property without due process of law and a violation of the proscription against involuntary servitude. Appellants also contend that the union shop statute, which is the subject of this litigation, was not enacted pursuant to the Constitutional power to regulate interstate commerce.

I.

The Union Shop Statute Does Not Simply Repeal Portions of the Railway Labor Act as Contended by Appellees.

Appellees' sole defense to the contention of Appellants that the union shop statute is unconstitutional is based on the case of *Otten v. Baltimore & Ohio R. Co.*, 205 F. 2d 58, and the argument that Section 2, Eleventh of the Railway Labor Act is a mere repeal of a previous statutory prohibition and as such cannot be unconstitutional. (Appellees' Br. pp. 10, 11.) Appellees recognize that, according to Judge Hand in the *Otten* case, the union shop statute may be deemed to have affirmatively legalized union shop agreements if they were invalid and at common law and that under such circumstances a challenge to the constitutionality of the 1951 Amendment might be

“substantial.” Judge Hand reasoned, however, that since union shop agreements were valid under the common law of New York, there could not be any affirmative legalizing of union shop agreements. Appellees assert that there is no prohibition of common law in California of union shop agreements; hence, the union shop statute cannot affirmatively legalize union shop agreements in California.

On its face, the statute goes far beyond a *pro tanto* repeal of paragraphs fourth and fifth of the Railway Labor Act. First, it expressly provides that a union shop shall be permitted, and thereby affirmatively legalizes the arrangement; second, it supersedes any conflicting provision of the Railway Labor Act and not merely paragraph fourth and fifth of Section 2; third, it supersedes any other statute of the United States, such as the Norris-LaGuardia Act, which contains the declaration of policy that an employee “should be free to decline to associate with his fellows” (29 U. S. C., Sec. 102); fourth, it supersedes conflicting court decisions of the United States; fifth, it supersedes present and prospective state statutes such as “right to work” laws found in some eighteen states; sixth, it supersedes conflicting state rules of common law.

Other parts of the statute also contradict the idea of a mere repeal. Paragraph (a) of Section 2 Eleventh sets forth in detail the type of union shop agreement that can be entered into. Subparagraph (c) makes further provisions along the same line and sets forth how the requirement of union membership may be satisfied. These provisions are regulatory and affirmative new legislature prescribing rules for the future as well as the present. Thus, the statute is “*permissive*” in declaring that a union shop agreement shall be permitted. What is expressly

permitted by law is affirmatively authorized, sanctioned and legalized. The statute is *regulatory*; it spells out what shall constitute a valid union shop agreement and defines its force and effect. The statute is also *mandatory*. It expressly strikes down every conflicting law, state and federal.

The foregoing demonstrates the error of the *Otten* case, which is the sole case relied on by Appellees, which held that the union shop statute is equivalent only to a repeal *pro tanto* of Subsection Fifth. The difficulty with the *Otten* case is that the decision was based upon the validity of the union shop under the law of New York, where the controversy arose. But some eighteen states have right-to-work statutes, and, if the union shop statute does no more than to repeal the previous ban on the union shop in the Railway Labor Act, then a union shop is admittedly, unlawful in at least eighteen states. That would bring into application Judge Hand's statement that substantial Constitutional questions might arise if the statute affirmatively legalized union shop agreements. Conceivably, if Judge Hand's decision is correct, we could have the unique and probably unprecedented situation of an Act of Congress which is constitutional in twenty-two states and unconstitutional in eighteen states.

The *Otten* case came up on demurrer and the only question that was decided by Judge Hand was that any claim that the statute was unconstitutional *because it repealed a prior statutory provision was insubstantial*. Since Appellants' argument is not simply that the statute is unlawful because it repeals a prior prohibition, the language of the *Otten* case is inapplicable to the instant case. Judge Hand did not consider the statute in the context of the entire Railway Labor Act, nor did he have before

him for consideration the fact that some eighteen states have right-to-work laws which were swept aside, as well as thousands of contracts made pursuant to these right-to-work laws. In sum, Congress took affirmative action in legalizing the union shop in at least eighteen states and barred the remaining twenty-two, including the State of California, from enacting such legislation in the future.

Appellants wish to make it plain that they do not argue that the union shop statute is unconstitutional because it repealed in part prior prohibitions. Appellants' complaint is that the statute deprives them not of rights secured by statute, but of Constitutional rights. Appellants contend that Congress cannot authorize employers and unions in concert to violate constitutional freedoms of employees. This issue cannot be avoided by the evasive argument based on the *Ottens* case that Congress only repealed a previous statutory prohibition.

II.

The Issue Before the Court Is Whether the Union Shop Statute and Other Governmental Action Aid Private Parties in Some Way to Bring About the Union Shop.

Appellees assert that Appellants rely solely upon the theory that the unions are exercising delegated legislative authority when they contract with the railroads for a union shop. This is not a correct statement of our position nor of the applicable rule of law for determining the existence of "government action." Appellants' point is that the action of private parties is subject to test under the federal Constitution whenever it is "in some way" aided by the Government or, as the Supreme Court of the United States has expressed it, "where the thumb of gov-

ernment is on the scales" in their favor. (*Civil Rights Cases*, 109 U. S. 3, 11, 17; *American Communications Assn. v. Douds*, 339 U. S. 382, 401; *Public Utilities Comm. v. Pollak*, 343 U. S. 451, 462; *Shelley v. Kraemer*, 334 U. S. 1, 14; *Barrows v. Jackson*, 346 U. S. 349, 358.)

Appellees frame their contention as if the rule were either that the action complained of must be taken by an agency of government or in some way directly brought about by government. They cite no authority for this proposition.

Three distinct types of government assistance exist in this case:

(1) Legislative action in the form of, (a) the passage by Congress of the Union Shop Statute, (b) the intent of Congress as shown by the legislative history of the Statute to establish compulsory union membership in the railroad industry, and (c) making the Union Shop Statute an integral part of the Railway Labor Act which confers power on the unions to enforce such demands.

(2) Executive action by (a) the intervention of the National Mediation Board, (b) the direct intervention by President Truman in his appointment of Emergency Board No. 98, and (c) the Report of this Board finding that Congress had established a public policy in favor of a union shop on the railroads and recommending that the arrangement be put into effect.

(3) By the action of Respondent unions in their capacity as statutory bargaining agents under the Railway Labor Act demanding and obtaining a union shop in conformity with the Act under threat of strike sanctions.

Each of these forms of aid is alone sufficient to require judicial consideration of the Constitutional issues raised here. But for each of these governmental steps the union shop would have been impossible of achievement. This is undoubtedly sufficient under the rule laid down in *Shelley v. Kraemer*, 334 U. S. 1, 19.

Appellants would like to bring to the court's attention additional cases for the proposition that where governmental action aids private parties in some way, Constitutional questions arise. *Public Utilities Comm v. Pollak*, 343 U. S. 451, involved a private company which had instituted a program of receipt of radio broadcasts on its busses and trolleys without prior permission from any public agencies. Riders complained to the Public Utilities Commission and it held a hearing and declared that the practice was not adverse to public interest and permitted it to be continued. The riders went to court contending that their rights to privacy under the First and Fifth Amendments were being abridged. The Supreme Court found the requisite "government action" even though the company was not a governmental agency and it had not been ordered by any agency to receive radio broadcasts. *Permissive* action of the Commission was regarded as sufficient to raise a Constitutional question. (343 U. S. at 462.) So, in this case, even if the "permissive" grant by Congress was taken literally, it is "government action" sufficient to raise Constitutional issues.

Permissive authority expressly granted or otherwise allowed by a law-making body has been held by the Supreme Court to be governmental action in other cases. In *Smith v. Allwright*, 321 U. S. 649, the Supreme Court, speaking of the federal Constitution grant to all its

citizens of a right to participate in elections without restriction in any state because of race, said at page 664:

“This grant to the people of the opportunity for choice is not be nullified by a state through casting its electoral process in a form which *permits* a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.” (Emphasis added.)

In *Shelley v. Kraemer*, 334 U. S. 1, the “but for” test was applied when the court said:

“It is clear that *but for* the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.” (334 U. S. 19.) (Emphasis added.)

In the case at bar, it has already been shown that “but for” various forms of governmental action, including enactment of the union shop statute and the striking down of conflicting state laws, there could be no union shop in the railroad industry.

Railroad companies and railroad unions are quasi-governmental agencies for some purposes. Railroads and their employees, in engaging in common carriage of persons and property, are employed in a business effected with a public interest. Nearly every aspect of their affairs is a matter of public concern and subject to governmental regulation. What is sufficiently public to be subjected to such extensive regulation is likewise sufficiently beyond the category of purely private action to be subject to Constitutional limitations. Thus, governmental rather than purely private action to be subject to Constitutional

limitations. Thus, governmental rather than purely private action is involved in the conduct of a company-owned town. (*Marsh v. Alabama*, 326 U. S. 501.) The Supreme Court said:

“In our view, the circumstance that the property rights to the premises where the deprivation of liberty, here involved, took place, were held by others than the public, is not sufficient to justify the State’s *permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.” (326 U. S. at 509.) (Emphasis added.)

Appellants do not contend that Appellees are “governmental entities,” and we have pointed out that the test of “government action” does not require that the court find Appellees to be “governmental entities.” There is “government action” sufficient to raise Constitutional questions when private action looses its purely private character and is sanctioned “in some way” by Government. (*Civil Rights Cases*, 109 U. S. 3, 11, 17.)

III.

Appellees’ Reply Is Significant for Its Omissions.

Appellees submit that the outstanding feature of Appellants’ brief is what it does not say. They make no effort whatsoever to controvert Appellants’ analysis of the decisions and conclusions to be drawn from them under the first six points of Appellants’ brief. They do not question the point that a man’s right to work may not Constitutionally be subjected to unreasonable, arbitrary and capricious conditions. They do not attempt to convert the authorities cited by Appellants that there is

freedom of association under the Constitution, or that Appellants have been denied freedom of speech and freedom of religion, or that the money to be taken from unwilling union members through compulsory unionism is property protected by the Fifth Amendment. Appellee disposed of all of these arguments at page 11 of their brief by saying that the *Otten* case is decisive of all of these points and "is a sufficient answer to the contentions advanced by Appellants in the first six sections of their argument to this court."

Appellees' admissions in these particulars cannot be inadvertent. They do not dispute the authorities and arguments referred to for they know that these authorities and arguments cannot be answered.

In conclusion, Appellants call the attention of the court to a decision of the Nebraska Supreme Court, *Hanson et al. v. Union Pacific R.R. Co.*, 160 Neb. 669, decided since the filing of Appellants' opening brief on July 6, 1955. In the *Hanson* case the Supreme Court of Nebraska held that Subsection Eleventh of Section 152 of the Railway Labor Act is unconstitutional in that it violates individual freedom of association, the individual's right to work and constitutes taking of property without due process of law insofar as it requires involuntary contributions from the individual's compensation to labor unions. This decision is persuasive authority for Appellants' position.

Conclusion.

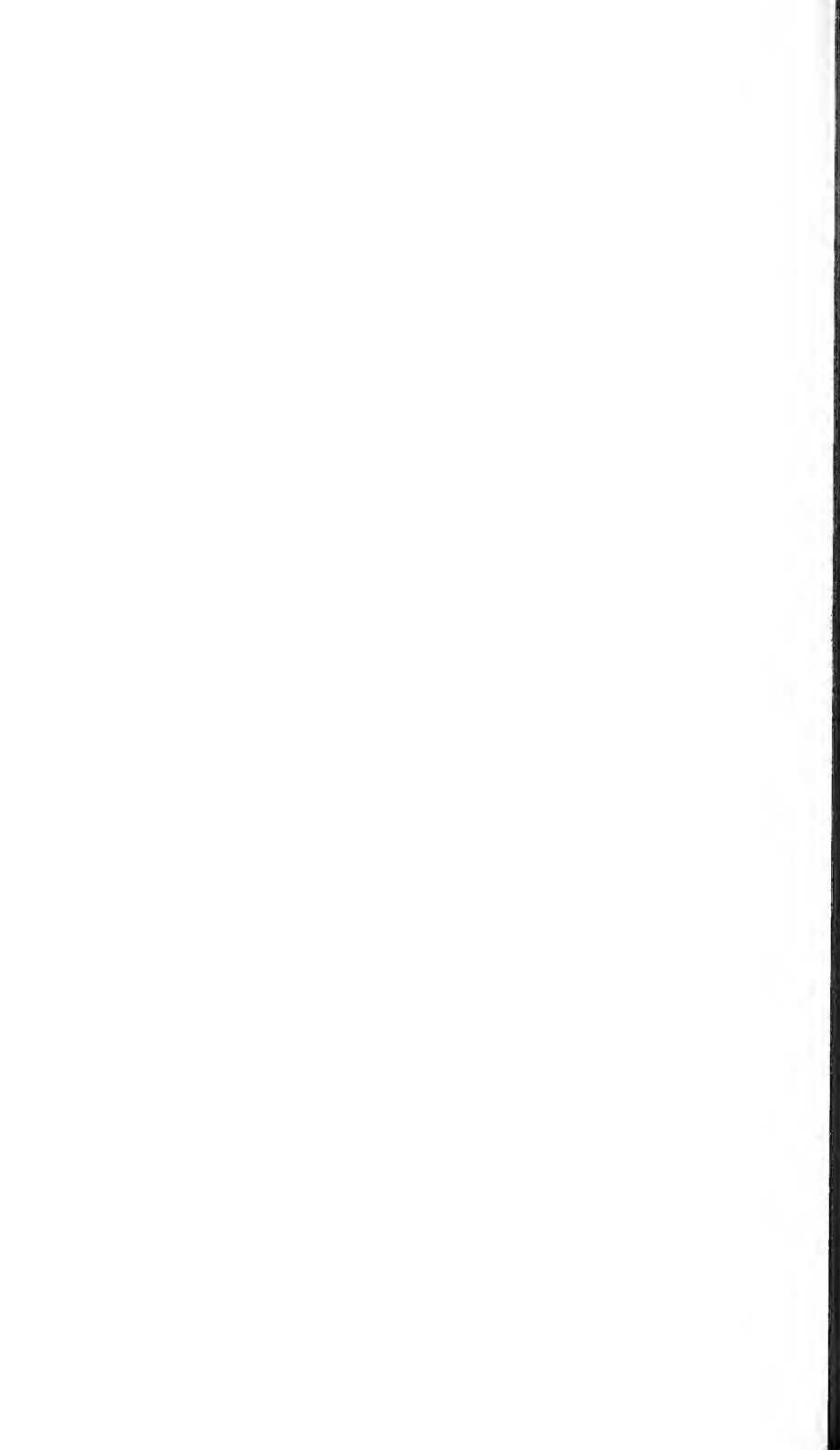
For the reasons set forth herein, Appellants respectfully pray that this Honorable Court reverse the judgment of the District Court denying a preliminary injunction and granting summary judgment and dismissal of the above-entitled cause.

HILL, FARRER & BURRILL,

By CARL M. GOULD,

RAY L. JOHNSON, JR.,

Attorneys for Appellants.



Nos. 14486-14487

**United States
Court of Appeals**
for the Ninth Circuit

HARRY JONES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

CARRIE A. JONES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

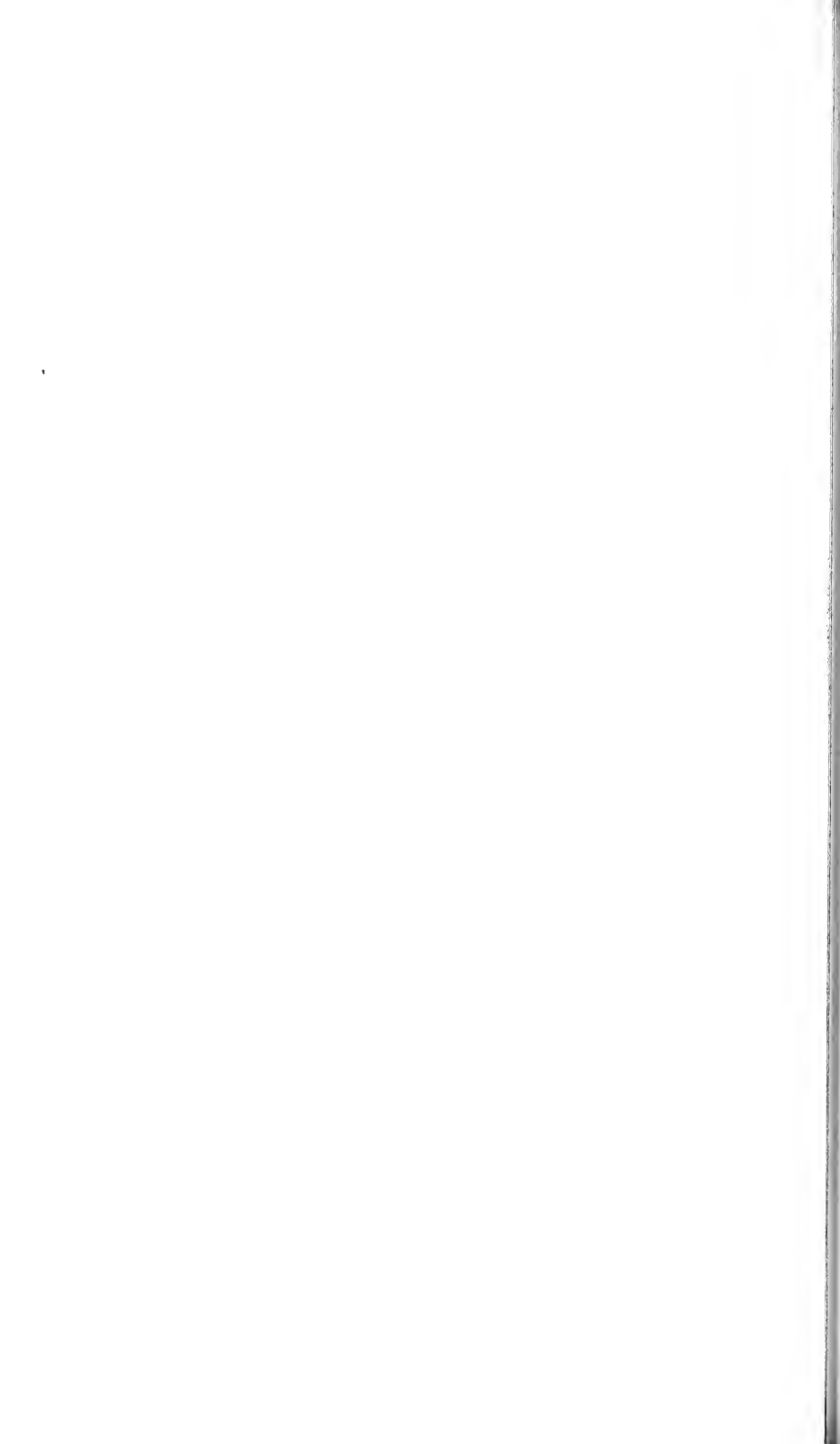
**Appeals from the United States District Court for the
Eastern District of Washington,
Southern Division.**

FILED

NOV 15 1954

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-29-54

PAUL P. O'BRIEN
CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Eastern District of Washington, Southern Di-
vision

No. 835

HARRY JONES,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action
alleges as follows, to wit:

1.

This action arises under Title 28, United States
Code, Section 1346 (a) (1) and 1402 (a) as here-
inafter more fully appears.

2.

That the plaintiff, Harry Jones, for the calendar
year 1946 executed an income tax return and paid
the income tax due thereunder as said return was
completed in the amount of \$1,526.54. That said re-
turn was prepared and mailed to the Collector of
Internal Revenue at Tacoma, Washington, on Janu-
ary 13, 1947. That thereafter, on or about January
15, 1947, plaintiff executed and mailed unto the Col-
lector of Internal Revenue at Tacoma, Washington,
an amended return and claim for refund for the
reason that of said total tax paid the sum of \$1,-
082.54 was erroneously paid to and collected by

the Collector of Internal Revenue at Tacoma, Washington. That thereafter, on or about the 8th day of October, 1951, plaintiff mailed unto the Collector of Internal Revenue at Tacoma, Washington, an amended claim for refund for the reason that the original claim had been erroneously executed.

3.

That more than six months have passed since the filing of the above claims and plaintiff has been advised of no action on said claims.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$1,082.54, together with interest thereon at the rate of six per cent per annum from January 13, 1947, until paid, together with plaintiff's costs and disbursements herein incurred and for such other and further relief as to the Court may seem proper.

McGREGOR & HALSTEAD,

VELIKANJE & VELIKANJE

/s/ JOHN S. MOORE, JR.,

Attorneys for Plaintiff.

[Endorsed]: Filed July 24, 1953.

[Title of District Court and Cause.]

ANSWER

Defendant admits, denies and alleges as follows:

1. Admits paragraph 1 of the complaint but alleges that this Court lacks jurisdiction of this

cause of action because no claim for refund was timely filed pursuant to Section 322(b) of the Internal Revenue Code and as required by Section 3772(a) of the Internal Revenue Code.

2. Denies paragraph 2 of the complaint except admits:

(a) plaintiff. Harry Jones, for the calendar year 1946 executed an income tax return and paid the income tax shown thereon in the amount of \$1,526.54, on or about January 13, 1947, to the Collector of Internal Revenue at Tacoma, Washington.

(b) plaintiff, Harry Jones filed what purported to be a claim for refund on or about October 10, 1951, with the Collector of Internal Revenue at Tacoma, Washington.

3. Denies paragraph 3 of the complaint except admits that more than six months has passed since the filing of what purported to be a claim for refund as referred to in paragraph 2(b) above.

And as Further Defense defendant alleges that this Court lacks jurisdiction of this cause of action because no claim for refund was filed by plaintiff within three years from the time the income tax return was filed or within two years from the time the tax was paid pursuant to Section 322(b) of the Internal Revenue Code. No claim for refund having been filed within the prescribed time limitation as required by Section 3772(a) of the Internal Reve-

nue Code, this action cannot be maintained by any court.

Wherefore, defendant prays that this action be dismissed with costs to go to the defendant.

/s/ WILLIAM B. BANTZ,
United States Attorney.

[Endorsed]: Filed September 21, 1953.

[Title of District Court and Cause.]

AFFIDAVIT OF HARRY JONES

State of Washington,
County of Benton—ss.

Harry Jones, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above cause and is and has been at all times since prior to January 1, 1946, the husband of Carrie Jones; that during the year 1947 in the month of January, affiant delivered to one Louis H. Harrison at Prosser, Washington, a statement of affiant's receipts and disbursements during the calendar year ending December 31, 1946, in order that the said Louis H. Harrison could prepare a Federal Income Tax Return for affiant and his wife, Carrie Jones, for said calendar year; that the said Louis H. Harrison was at that time maintaining an office in Prosser, Washington, as a public accountant, and holding himself out to the public as qualified to prepare Federal Income Tax Returns. That on or about the thirteenth day of January, 1947, affiant and his said

wife, Carrie Jones, went to the office of Louis H. Harrison, at Prosser, Washington, and there received from the said Louis H. Harrison, the originals and copies of the Federal Income Tax Returns for the calendar year ending December 31, 1946, which the said Louis H. Harrison had prepared for affiant and his said wife; that said returns consisted of one Form 1040 for affiant, one Form 1040 for affiant's wife, Carrie Jones, and one Form 1040-F for affiant and his wife, showing their schedule of farm income and expenses for said period referred to.

That on said date of January 13, 1947, affiant and his said wife, Carrie Jones, executed the Returns prepared by Louis H. Harrison, and inserted the two 1040 Forms and the one 1040-F Form in an envelope, together with a check drawn by affiant in the amount of \$3,195.58, made payable to the Treasurer of the United States, which envelope was securely sealed and addressed to the Collector of Internal Revenue at Tacoma, Washington. That affiant on said thirteenth day of January, 1947, thereafter mailed said envelope, postage prepaid at the United States Post Office at Prosser, Washington, That of said sum of \$3,195.58 the sum of \$1,526.54 was computed to be income tax for affiant and the sum of \$1,669.04 was computed to be the income tax due from affiant's wife, Carrie Jones; that such income tax as computed on the separate returns, for affiant and his wife, Carrie Jones, was the result of the computation of gross income for affiant and his wife in the sum of \$16,644.96.

That on or about the fifteenth day of January, 1947, affiant at his home near Prosser, Washington, was engaged in examining the carbon copies of the income tax returns executed by the said Louis H. Harrison for affiant and his wife for the calendar year ending December 31, 1946; that in such examination affiant determined that the said Louis H. Harrison had made a mistake in the computation of the gross income for affiant and his said wife; that affiant thereupon visited the said Louis H. Harrison of Prosser, Washington, on or about the fifteenth day of January, 1947, and called to the attention of the said Louis H. Harrison the mistake in the computation of the gross income; that the said Louis H. Harrison thereupon agreed with affiant that a mistake had been made and prepared amended returns for affiant and his wife for said calendar year, by executing an amended 1040 return for affiant and amended 1040-F for affiant and his wife, and an amended 1040 for affiant's wife; that in addition, the said Louis H. Harrison prepared a claim for refund for affiant and a claim for refund for affiant's wife; that following the preparation of these forms by the said Louis H. Harrison, affiant and his wife executed said amended returns and said claims by fixing their signatures thereto and affiant on or about the fifteenth day of January, 1947; placed the originals of the following instruments in an envelope securely sealed and addressed to the Collector of Internal Revenue, at Tacoma, Washington: One form 1040 on behalf of Carrie A. Jones, entitled an Amended Return, one form 1040 for

Harry Jones, entitled an Amended Return, and one form 1040-F, for Harry Jones and Carrie A. Jones, entitled an Amended Return, one claim for refund for the refunding of excess income tax paid for Harry Jones, one claim for refund for excess tax paid for Carrie A. Jones; that affiant mailed said envelope in which said instruments were placed at the United States Post Office at Prosser, Washington, postage prepaid. That on or about the first day of January, 1951, affiant was discussing his overpayment of the tax with an employee of the Internal Revenue Service, at the Office of the Internal Revenue Service at Yakima, Washington; that when affiant advised said employee that he had heard nothing upon his claim for refund and had not received any money back, said employee advised affiant that he should take some definite action; that affiant thereafter hired counsel to assist him in the matter and on or about the thirteenth day of September, 1951, affiant signed an amended claim for refund prepared by his counsel of record in this matter, which claim for refund was filed in the Office of the Collector of Internal Revenue at Tacoma, Washington, on or about the eighth day of October, 1951; that there are attached hereto and made a part hereof by reference, the following items relating to this Affidavit:

1. Cancelled check executed by Harry G. Jones, dated January 13, 1947, in the amount of \$3,195.58, payable to the order of Treasurer of the United States, which check is the original check issued by

affiant for the payment of the total federal income tax due for the calendar year ending December 31, 1946, under the computations in the original income tax returns prepared by Louis H. Harrison, and mailed on or about January 13, 1947.

2. Cancelled check dated January 13, 1947, issued by Harry G. Jones in the sum of \$25.00 payable to Louis H. Harrison, which check is the check used in payment to Louis H. Harrison by affiant for the preparation of the federal income tax returns for affiant and his wife, for the calendar year ending December 31, 1946.

3. True and correct photostatic copy of Form 1040-F amended return, schedule of farm income and expenses, pages 1 and 3 for Harry and Carrie A. Jones, Prosser, Washington, being the true and correct copy of those portions of Form 1040-F prepared by Louis H. Harrison on or about January 15, 1947, for affiant and affiant's wife, for the calendar year ending December 31, 1946, and mailed by affiant to the Collector of Internal Revenue on or about January 15, 1947.

4. Form 1040, amended individual income tax return for 1946 for Carrie A. Jones, being a true and correct photostatic reproduction of that portion of such form 1040 prepared by Louis H. Harrison for affiant and his wife, Carrie A. Jones, for the calendar year ending December 31, 1946, and mailed by affiant on or about January 15, 1947, to the Collector of Internal Revenue at Tacoma, Washington.

5. True and correct photostatic copy of that portion of Form 1040, amended individual income tax return for Harry Jones, as prepared by Louis H. Harrison, signed by affiant and mailed by affiant to the Collector of Internal Revenue at Tacoma, Washington, on or about January 15, 1947.

6. A true and correct photostatic copy of Form 843, claim for refund as prepared by Louis H. Harrison and signed by affiant, being the claim for refund for federal income tax paid for the calendar year ending December 31, 1946, being the photostatic copy of a claim mailed by affiant to the Collector of Internal Revenue at Tacoma, Washington, on or about January 15, 1947.

7. True and correct photostatic copy of Form 843, claim for refund, prepared by Louis H. Harrison and signed by Carrie A. Jones, for a claim for refund of taxes paid for the calendar year ending December 31, 1946, the original of which was mailed by affiant on or about January 15, 1947, to the Collector of Internal Revenue at Tacoma, Washington.

8. True and correct carbon copy of Form 843, Amended claim, prepared by affiant's counsel, and signed by affiant on September 13, 1951, and filed with the Collector of Internal Revenue at Tacoma, Washington, on or about the eighth day of October, 1951.

9. True and correct carbon copy of Form 843, Amended Claim, prepared by affiant's counsel for

the said Harry Jones and affiant and mailed in the United States Post Office at Prosser, Washington. as set forth in the Affidavit of Harry Jones for the reason that affiant was present at the time said Harry Jones affixed his signature to said instruments and mailed the same at the said Post Office; that affiant also knows that the instruments attached to said Affidavit of Harry Jones are the instruments as identified by him in his Affidavit, and that all other facts set forth in the Affidavit of the said Harry Jones are true and correct to the best information and belief of affiant.

/s/ CARRIE A. JONES.

Subscribed and sworn to before me this 23rd day of January, 1954.

[Seal] /s/ DWIGHT A. HALSTEAD,
Notary Public in and for the State of Washington,
Residing at Prosser.

[Endorsed]: Filed March 9, 1954.

U. S. Treasury Department
Office of the Director of Internal Revenue
Washington Building
Tacoma 2, Wash.

AFFIDAVIT

To Whom It May Concern:

This affidavit pertains to the 1946 accounts of Harry G. Jones and Carrie A. Jones of Prosser, Washington. The following facts are presented as revealed by the records of the Seattle District Director's office in the Collection Division located at Tacoma, Washington:

1. The records of the Collection Division indicate that the 1946 returns of Harry G. Jones and Carrie A. Jones were received with a payment of income tax on January 14, 1947.

2. A search has been made of all pertinent files and there is no record of having received Claims or amended returns prior to the expiration date of the Statute of Limitation, which for the calendar year 1946, is March 15, 1950.

3. There is a record of Claims having been filed for 1946 by Harry G. Jones and also by Carrie A. Jones on October 10, 1951, and November 18, 1952, respectively. This fact is evidenced by a Record of Claims (Form 815).

I hereby certify the above to be a true and correct statement of the facts as evidenced by the orig-

inal books of entry and records available in the Collection Division of the Seattle District Director's office.

/s/ HERMAN SCHWEIZER,
Chief, Accounting Branch.

State of Washington,
County of Pierce—ss.

I, Marceil L. Hay, Notary Public, in and for the State of Washington, do hereby certify that on this 6th day of November, 1953, personally appeared before me Herman Schweizer, to me known to be the individual described in and who executed the foregoing statement and acknowledged that he signed the same as his free and voluntary act and for the purposes therein mentioned.

Given under my hand and official seal this 6th day of November, 1953.

[Seal] /s/ MARCEIL L. HAY,
Notary Public in and for the State of Washington,
Residing at Tacoma.

[Endorsed]: Filed April 7, 1954.

PLAINTIFF'S EXHIBIT NO. 1

Form 443
TREASURY DEPARTMENT
REVISED MAY 25, 1944
(Revised April 1943)

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☒ REFUND OF TAX ILLEGALLY COLLECTED.
- ☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
- ☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

COLLECTOR'S STAMP (State required)

STATE OF Washington
COUNTY OF Benton

ss:

TYPE
OR
PRINT

Name of taxpayer or purchaser of stamps James J. Jones

Business address Prosser, Washington

Residence Prosser, Washington

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Tacoma, Washington
2. Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1946 to Dec. 31, 1946
3. Character of assessment or tax Income Tax
4. Amount of assessment, \$ 1526.54; dates of payment Jan. 15, 1947
5. Date stamps were purchased from the Government
6. Amount to be refunded \$ 444.00
7. Amount to be abated (not applicable to income or estate taxes)
8. The time within which this claim may be legally filed expires, under Section 322 IRC on Jan. 15, 1950

The deponent verily believes that this claim should be allowed for the following reasons:

The gross income as shown on the original return was erroneous. Such gross income for both the taxpayer and wife, Carrie A. Jones, should have been 7,370.36, instead of \$16,644.96, as shown. This results in a gross income for taxpayer of \$3685.18, and a corresponding reduction in tax. Amended returns are attached hereto to support the above allegations.

Pltf. Exhibit 1 For Identification

Admitted

CASE NO. 835

(Attach introduction sheet if space is not sufficient)

Sworn to and subscribed before me this

Signed

day of

19

Signature of Plaintiff to be attached with

Title

(SEE INSTRUCTIONS ON REVERSE SIDE)

16-50000

AMERICAN INSTITUTE

FORM 1040 F
(Revised August 1981)
Treasury Department
Internal Revenue Service

Page 1

UNITED STATES SCHEDULE OF FARM INCOME AND EXPENSES

For Calendar Year 194

**Attach This Form
to Your Income
Tax Return Form
1040 and File It
With the Collector
of Internal Revenue
for Your District**

Or for year beginning, 194., and ending, 194.

HARRY AND CARLIE A. JONES

Name ~~XXXXXXXXXX~~ WASHINGTON

Location of farm or farms

Number of acres in each farm

**Fill in Pages 1 and 3
if Your Accounts Are
Kept on a Cash Basis.**

**If You Keep Books
on an Accrual Basis
and Desire to Use
This Form, Fill in
Page 2 and 3 Instead**

FARM INCOME FOR TAXABLE PERIOD COMPUTED ON A CASH RECEIPTS AND DISBURSEMENTS BASIS

1. SALE OF LIVESTOCK BARGAINS			2. SALE OF FOODSTUFFS EARNED			3. OTHER FARM INCOME		
Kind	Quantity	Amount	Kind	Quantity	Amount	Item	Amount	
Cattle	1	532.00	Grain	1	2516.17	Mdn. rec'd for produce		
Hog			Hay			Machine work		
Sheep			Cotton			Hire of teams		
Goats			Tobacco			Breeding fees		
Pigs			Potatoes			Rent rec'd in crop shares		
			Sugar beets			Work off farm		
			Vegetables			Wood and lumber		
			Fruits			Other forest products		
			Nuts			Agricultural program pay- ments	407.00	
			Dairy products			Other (specify):		
			Eggs					
			Meat products					
			Poultry, dressed					
			Wool and mohair					
			Honey					
			Syrup and sugar					
			Other (specify):					
Total			Total			Total		
(Enter on line 1 of schedule below)			(Enter on line 1 of schedule below)			(Enter on line 1 of schedule below)		

1. SALE OF LIVESTOCK AND OTHER ITEMS PURCHASED

1 Description	2 Units acquired	3 Gross sales price (contract price)	4 Cost or other basis	5 Improvement allowed for allocation (state acquisition or March 1, 1963)	6 Profit (loss) (sales minus cost or other basis)
1000000	45	145	40	107	38
Total (enter on line 6 of summary below)					

NUMBER OF PAGES AND DELETIONS COMPUTED ON A CASH RECEIPTS AND ENCUMBRMENTS BASIS

1	Cost of inventory (see instructions)	932 00	4	Expenses (from page 3)	283 30
2	See instructions	231 68	7	Depreciation (from page 3)	809 30
3	Other items	207 40	8	Net operating loss deduction (attach statement)	
4	Total cost of inventory and other items	667 00	9	Total Deductions	1092 60
5	Less: Inventory on hand	267 90			
6	Net operating loss				

Net operating loss from line 9 to be reported on line 22, Schedule C, page 2, Form 1040.

SALES EXPENSES FOR TAXABLE YEAR (See instructions)

21

[illegible]

¹⁰⁰ "Jockey 201" is used to up 1 meter on line 6 of summary on page 1 (cash basis) or line 7, page 2 (accrual basis)).

DEPORTATION (No. 1000000000)

[illegible]

Form 843

Treasury Department
Internal Revenue Service
(Revised Feb. 1949)

AMENDED CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Collector's Stamp. (Date received): [Blank]

State of Washington,
County of Benton—ss.

Name of taxpayer or purchaser of stamps: Harry Jones.

Business address: Prosser, Washington.

Residence: Prosser, Washington.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Tacoma, Washington.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from: 1-1-46, to 12-1-46.

3. Character of assessment or tax: Income Tax.

4. Amount of assessment, \$1526.54; dates of payment Jan. 15, 1947.

5. Date stamps were purchased from the Government.

6. Amount to be refunded: \$1082.54.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be legally filed expires, under section 322 of Internal Rev. Code on Jan. 15, 1950. Except: this is an amendment to prior claim.

The deponent verily believes that this claim should be allowed for the following reasons:

Gross income as shown on original return was erroneous. Original return showed gross income for taxpayer and wife, Carrie A. Jones, as \$16,644.96; gross income should have been \$7,370.36. Under original return taxpayer paid \$1,526.54 as tax on one-half erroneous gross. Amended return previously filed, together with an original claim, corrected taxpayer's one-half

of community income to \$3,685.18, with a corrected tax of \$444.00.

/s/ HARRY G. JONES.

Subscribed and sworn to before me this 13th day of September, 1951.

[Seal] /s/ DWIGHT A. HALSTEAD,
Notary Public for Washing-
ton, Residing at Prosser.

U. S. Treasury Department
Office of the Director of Internal Revenue
Washington Building
Tacoma 2, Wash.

July 9, 1953.

In Replying Refer to:

C:A:A
MST:aw
3002675-48

Mr. Harry Jones,
Prosser,
Washington.

Dear Mr. Jones:

Reference is made to your claim for refund, Form 843, in the amount of \$1,082.54, covering 1947 income tax, received in this office on October 10, 1951.

Since the records of this office do not disclose receipt of a prior 1947 claim or amended return to extend the statutory period, no further action can be taken on the claim received on October 10, 1951.

Very truly yours,

WILLIAM E. FRANK,
District Director.

By /s/ M. E. CHRISTIN,
Assistant Chief, Claims
Section.

PLAINTIFF'S EXHIBIT NO. 2

Form 500
TAXPAYER'S DEPARTMENT
INTERNAL REVENUE SERVICE
(Revised April 1967)

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☒ REFUND OF TAX ILLEGALLY COLLECTED.
☐ REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.
☐ ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

City of Washington

County of Barton

COLLECTOR'S STAMP

(Date received)

Name of taxpayer or purchaser of stamps Carry A. Jones

Business address

(Street)

Prosser

(City)

Washington

(State)

Residence

Prosser

Washington

The taxpayer, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

State in which return (if any) was filed Tacoma, Washington

Period (if for income tax, make separate form for each taxable year) from Jan. 1, 1966 to Dec 31, 1966

Character of assessment or tax Income Tax

Amount of assessment, \$ 1668.04; dates of payment Jan 15, 1967

Date stamps were purchased from the Government

Amount to be refunded \$ 1,225.04

Amount to be abated (not applicable to income or estate taxes)

The time within which this claim may be legally filed expires, under Section 322 IRC

on Jan. 15, 1970

The taxpayer verily believes that this claim should be allowed for the following reasons:

In the preparation of the Income Tax Return for taxpayer above, there was included in gross income the amount of \$9,274.60 in total, for taxpayer and husband, which amount was erroneous. Total gross income for taxpayer and husband, Harry Jones, should be 7,370.26, instead of the original figure of \$16,644.96, as shown on original returns. The amended returns attached display the calculations of the refund requested

Pltf. Exhibit 2

Admitted

835

(Amount before other credits if apportioned to other claimants)

Sworn to and subscribed before me this

Signed

Day of

19

Signature of Officer before whom sworn

(Title)

OFF INSTRUCTIONS ON REVERSE SIDE

16-48804

APPENDED RETURN

Page 1

FORM 1047
Individual Income Tax Return
For Calendar Year 1946

**U. S. INDIVIDUAL INCOME TAX RETURN
FOR CALENDAR YEAR 1946**

1946

For the year 1946, and ending

1947

1. **FILE THIS FORM**—If you are a taxpayer, you may use your Withholding Statement, form W-2, or your return from a partnership, if it shows more than \$1,000, consisting wholly of wages shown on W-2, or other income, or of such wages and not more than \$1,000 of other wages, dividends, and interest.

CARL A. JONES

(Print name and address of taxpayer and wife, last name first)

2. **STATE**—(If you are a resident of a state, territory, or possession of the United States)

TRUCKER

DENTON

WASHINGTON

(City)

(State)

3. **Occupation**

Do not write in these spaces

For

File

Serial

No.

District

(Cashier's Stamp)

4. **Joint Return**—If you are a taxpayer, you may use your Withholding Statement, form W-2, or your return from a partnership, if it shows more than \$1,000, consisting wholly of wages shown on W-2, or other income, or of such wages and not more than \$1,000 of other wages, dividends, and interest.

1. Your Name	2. Spouse's Name	3. Married joint return	4. Spouse's Name
Carrie A. Jones			

5. **Other income**—Enter here the total amount of your income, other than wages, salaries, and other compensation received in 1946, before any deductions for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see instruction 2.

6. See Husband's return for details of community income	7. Enter total here
	\$ 2400.00

8. **Enter here the total amount of your dividends**

9. **Enter here the total amount of your interest (including interest from Government obligations)**

10. **If you are entitled to any other income, give details on page 2 and enter the total here**

11. **Add amounts from lines 6, 8, 9, and 10, and enter the total here**

12. **IF YOUR INCOME WAS LESS THAN \$1,000**—You may use your tax in the tax table on page 4. This table, which is provided by law, automatically allows about 10 percent of your total income for charitable contributions, interest, taxes, medical expenses, medical expenses, and medical expenses. If your return shows any other income, give details on page 2 and enter the total here. If you are entitled to any other income, give details on page 2 and enter the total here.

13. **IF YOUR INCOME WAS \$1,000 OR MORE**—Use the tax table and compute your tax on page 4. You may either take a standard deduction of \$500 or figure your deductions, whichever is to your advantage.

14. **HUSBAND AND WIFE**—If husband and wife file separate returns, and one has no deductions, the other must also have deductions.

15. Enter your tax in the table on page 4, or from line 12, above	16. How much tax you paid in 1946
	\$

17. **Enter here the total amount of your tax**

18. **Enter here the total amount of your tax**

19. **Enter here the total amount of your tax**

20. **Enter here the total amount of your tax**

21. **Enter here the total amount of your tax**

22. **Enter here the total amount of your tax**

23. **Enter here the total amount of your tax**

24. **Enter here the total amount of your tax**

25. **Enter here the total amount of your tax**

26. **Enter here the total amount of your tax**

27. **Enter here the total amount of your tax**

28. **Enter here the total amount of your tax**

29. **Enter here the total amount of your tax**

30. **Enter here the total amount of your tax**

APPENDED RETURN

Form 843

Treasury Department

Internal Revenue Service

(Revised Feb. 1949)

AMENDED CLAIM

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

Collector's Stamp. (Date received): [Blank]

State of Washington,
County of Benton—ss.

Name of taxpayer or purchaser of stamps: Carrie A. Jones.

Business address: Prosser, Washington.

Residence: Prosser, Washington.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed: Tacoma, Washington.

2. Period (if for tax reported on annual basis, prepare separate form for each taxable year) from Jan. 1, 1946, to Dec. 1, 1946.

3. Character of assessment or tax: income tax.

4. Amount of assessment, \$1,669.04; dates of payment January 15, 1947.

5. Date stamps were purchased from the Government.

6. Amount to be refunded: \$1,120.04.

7. Amount to be abated (not applicable to income, gift, or estate taxes).

8. The time within which this claim may be legally filed expires, under section 322 of Internal Revenue Code on January 15, 1950, except this is an amendment to prior claim.

The deponent verily believes that this claim should be allowed for the following reasons:

Gross income as shown on original return was erroneous. Original return showed gross income for taxpayer and husband, Harry Jones, as \$16,644.96. Gross income should have been \$7,370.36. Under original return, taxpayer paid \$1,669.04 as tax on one-half erroneous gross. Amended return previously filed together with an original claim corrected taxpayer's one-half

of community interest to \$3,685.18, with a corrected tax of \$549.00.

/s/ CARRIE A. JONES.

Subscribed and sworn to before me this 12th day of November, 1952.

[Seal] /s/ DWIGHT A. HALSTEAD,
Notary Public for Washington,
Residing at Prosser.

U. S. Treasury Department
Office of the Director of Internal Revenue
Washington Building
Tacoma 2, Wash.

July 9, 1953.

In Replying Refer to:

C:A:A

MST:aw

3002674-48

Mrs. Carrie Jones,
Prosser,
Washington.

Dear Mrs. Jones:

Reference is made to your claim for refund, Form 843, in the amount of \$1,120.04, covering 1947 income tax, received in this office on November 18, 1952.

Since the records of this office do not disclose receipt of a prior 1947 claim or amended return to ex-

tend the statutory period, no further action can be taken on the claim received on November 18, 1952.

Very truly yours,

WILLIAM E. FRANK,
District Director;

By /s/ M. E. CHRISTIN,
Assistant Chief, Claims
Section.

Plaintiff's Exhibit No. 3

No. 835

[Check—Front]

7 Prosser, Washington Jan. 13, 1947 No. 13

Prosser Branch

The Old National Bank 98-138/12
of Spokane

Pay to the

Order of Treasurer of United States \$3,195.58

Three Thousand-Ninety-five & 58/100 Dollars

/s/ HARRY G. JONES

1526.54

1669.04

[Back]

[Department of Internal Revenue Stamp Dated
Jan. 24, 1947.]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on regularly for trial before the above-entitled Court on April 26, 1954, the plaintiff appearing by his attorney, John S. Moore, Jr., and the defendant United States of America appearing by William M. Tugman, Assistant United States Attorney for the Eastern District of Washington, and the court having heard the testimony and argument of counsel, and being fully advised in the premises, makes the following:

Findings of Fact

I.

That the plaintiff filed income tax returns for the calendar year ending December 31, 1946, and that said returns were prepared by Louis H. Harrison, an accountant.

II.

That plaintiff and his wife executed the returns prepared by Louis H. Harrison and inserted them in an envelope, together with a check drawn by the plaintiff in the amount of \$3,195.58 made payable to the Treasurer of the United States, and addressed and mailed, with postage prepaid, said returns to the Collector of Internal Revenue, Tacoma, Washington, on the 13th day of January, 1947.

III.

That on or about the 15th day of January, 1947, the plaintiff concluded from a re-examination of

the returns for plaintiff and his wife for the calendar year ending December 31, 1946, that a mistake had been made by the accountant, Louis H. Harrison, in computing the gross income for plaintiff and his wife.

IV.

That pursuant to plaintiff's discovery of the mistake on said returns the plaintiff caused accountant Louis H. Harrison to prepare amended returns and a claim for refund for plaintiff and his wife.

V.

That the originals of the amended returns and claim for refund were placed in an envelope addressed and mailed to the Collector of Internal Revenue, Tacoma, Washington, with postage prepaid, on or about the 15th day of January, 1947.

VI.

That the Collector of Internal Revenue has no record of receiving any of the documents mailed on or about the 15th day of January, 1947, and that a search of all pertinent files in the Collector's Office disclosed no record of having received said amended returns or claim for refund for the year 1946.

From the foregoing Findings of Fact the Court makes the following:

Conclusions of Law

I.

That the plaintiff has failed to sustain the burden of proof that amended returns and claim for refund were filed within the three-year statute of

limitations; that the provisions of Title 26, U.S.C.A., Section 3772(a), provide that no suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected until a claim for refund has been timely filed with the Commissioner of Internal Revenue, pursuant to Section 322(b) (1) of the Internal Revenue Code.

II.

That the mere mailing of an amended return or claim for refund is, under the provisions of Sections 3772(a) and 322(b) (1) of the Internal Revenue Code, insufficient, and that it is necessary that such papers be filed with the Collector of Internal Revenue and that filing is not complete until the document is delivered and received by the proper official and filed by him.

III.

That the necessity of filing is jurisdictional and that compliance with the provisions of the law relating to filing is necessary to the institution of this action.

Dated this 9th day of June, 1954.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 10, 1954.

United States District Court for the Eastern
District of Washington, Southern Division

No. 835

HARRY JONES,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on for trial before the above-entitled Court sitting without a jury on the 26th day of April, 1954, and the Court having rendered judgment for the defendant, it is hereby

Ordered, Adjudged and Decreed that the plaintiff take nothing and that this action be dismissed with prejudice on its merits, with each party to bear its own costs herein.

Dated this 9th day of June, 1954.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

Service of Copy acknowledged.

[Endorsed]: Filed June 10, 1954.

United States District Court for the Eastern
District of Washington, Southern Division

No. 836

CARRIE A. JONES,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

This matter having come on for trial before the above-entitled Court sitting without a jury on the 26th day of April, 1954, and the Court having rendered judgment for the defendant, it is hereby

Ordered, Adjudged and Decreed that the plaintiff take nothing and that this action be dismissed with prejudice on its merits, with each party to bear its own costs **herein**.

Dated this 9th day of June, 1954.

/s/ WILLIAM J. LINDBERG,

United States District Judge.

Presented by:

/s/ WILLIAM M. TUGMAN,

Assistant U. S. Attorney.

Service of Copy acknowledged.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

MOTION FOR JUDGMENT NOTWITHSTANDING THE DECISION OF THE COURT, OR IN THE ALTERNATIVE FOR A NEW TRIAL

Comes now the plaintiff, Harry Jones, and respectfully moves the Court for judgment notwithstanding the decision of the Court, or in the alternative for a new trial, on the following grounds:

1. Irregularity in the proceedings of the Court, by which the plaintiff was prevented from having a fair trial.

2. Accident or surprise which ordinary prudence could not have guarded against.

3. Newly discovered evidence material for plaintiff which they could not, with reasonable diligence, have discovered and produced at the trial.

4. Excessive damages appearing to have been given to defendant, under the influence of passion or prejudice.

5. Insufficiency of the evidence to justify the Court's decision, and that such decision is against the law.

6. Error in law occurring at the trial and excepted to at the time by plaintiff.

VELIKANJE, VELIKANJE &
MOORE,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

**MOTION FOR JUDGMENT NOTWITHSTANDING
DECISION OF THE COURT, OR IN
THE ALTERNATIVE FOR A NEW TRIAL**

Comes now the plaintiff, Carrie A. Jones, and respectfully moves the Court for judgment notwithstanding the decision of the Court, or in the alternative for a new trial, on the following grounds:

1. Irregularity in the proceedings of the Court, by which the plaintiff was prevented from having a fair trial.

2. Accident or surprise which ordinary prudence would not have guarded against.

3. Newly discovered evidence material for plaintiff which she could not, with reasonable diligence, have discovered and produced at the trial.

4. Excessive damages appearing to have been given to defendant under the influence of passion or prejudice.

5. Insufficiency of the evidence to justify the Court's decision, and that such decision is against the law.

6. Error in law occurring at the trial and excepted to at the time by plaintiff.

**VELIKANJE, VELIKANJE &
MOORE,**

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed June 10, 1954.

[Title of District Court and Cause.]

No. 835

ORDER

This cause came on to be heard on July 17, 1954, on the motion by the plaintiff herein for judgment notwithstanding the decision of the Court, or in the alternative for a new trial, and it appearing to the Court that said motion should be denied, it is

Ordered that the plaintiff's motion for judgment notwithstanding the decision of the Court and for judgment in accordance with the motion of the plaintiff be denied, and, it is

. Further Ordered that the motion for new trial be denied.

Dated this 19th day of July, 1954.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

[Endorsed]: Filed July 19, 1954.

[Title of District Court and Cause.]

No. 836

ORDER

This cause came on to be heard on July 17, 1954, on the motion by the plaintiff herein for judgment notwithstanding the decision of the Court, or in the alternative for a new trial, and it appearing to the Court that said motion should be denied, it is

Ordered that the plaintiff's motion for judgment notwithstanding the decision of the Court and for judgment in accordance with the motion of the plaintiff be denied, and, it is

Further Ordered that the motion for new trial be denied.

Dated this 19th day of July, 1954.

/s/ WILLIAM J. LINDBERG,
United States District Judge.

Presented by:

/s/ WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

[Endorsed]: Filed July 19, 1954.

[Title of District Court and Cause.]

COURT TRIAL

Case called for trial by the Court, Mr. John S. Moore, Jr., and Mr. Dwight Halstead appearing for Plaintiff and Mr. William M. Tugman, Assistant United States Attorney, appearing for Defendant.

The following stipulations were orally agreed to by all parties:

1. Case No. 836, Carrie Jones vs. USA, to rest on decision in this case.

2. Contents of the affidavits are to be considered the same as if the affiants were present to testify.

The following exhibits were received in evidence:

Pltf's Exh. 1.—Claim and amended return of Harry Jones.

Pltf's Exh. 2.—Claim and amended return of Carrie A. Jones.

Pltf's Exh. 3.—Check dated 1/13/47, Harry G. Jones to Treas. of the United States.

After argument of counsel, the Court found for the defendant and dismissed the complaint. Findings and Judgment to be presented.

[Title of District Court and Cause.]

No. 835

NOTICE OF APPEAL

Notice Is Hereby Given that the plaintiff, Harry Jones, by his attorneys of record, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from that final judgment entered in the above-entitled Court on the 10th day of June, 1954, and that certain order denying plaintiff's Motion for Judgment Notwithstanding the Decision of the Court, and Motion for New Trial entered in the above-entitled Court on the 19th day of July, 1954, and all other orders of the Court entered in the above-entitled action.

Dated this 4th day of August, 1954.

/s/ DWIGHT A. HALSTEAD,

/s/ JOHN S. MOORE,

Attorneys for Plaintiff.

[Endorsed]: Filed August 4, 1954.

[Title of District Court and Cause.]

No. 836

NOTICE OF APPEAL

Notice is Hereby Given that the plaintiff, Carrie Jones, by her attorneys of record, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit, from that final judgment entered in the above-entitled Court on the 10th day of June, 1954, and that certain order denying plaintiff's Motion for Judgment Notwithstanding the Decision of the Court, and Motion for New Trial entered in the above-entitled Court on the 19th day of July, 1954, and all other orders of the Court entered in the above-entitled action.

Dated this 4th day of August, 1954.

/s/ DWIGHT A. HALSTEAD,

/s/ JOHN S. MOORE,

Attorneys for Plaintiff.

Affidavit of Mailing attached.

[Endorsed]: Filed August 5, 1954.

[Title of District Court and Cause.]

No. 835

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That we, Harry Jones and Carrie Jones, husband and wife, the Plaintiffs above named, as Principal, and the United Pacific Insurance Company, a corporation organized under the laws of the State of Washington, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto United States of America, in the just and full sum of Two Hundred Fifty and no/100 Dollars (\$250.00), for which sum, well and truly to be paid, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 4th day of August, 1954.

The Condition of This Obligation is Such, That,

Whereas, the above-named United States of America on the 10th day of June, A.D. 1954, in the above-entitled action and Court, recovered judgment against the plaintiffs' Harry Jones and Carrie Jones, husband and wife, above named for dismissal of said plaintiff's action against said defendant.

And Whereas, the above-named Principals have heretofore given due and proper notice that he appeal from said decision and judgment of said Court to the United States Court of Appeals, Ninth Circuit.

Now, Therefore, If the said Principal Harry Jones and Carrie Jones, husband and wife, shall pay all costs and damages that may be awarded against them or either of them on the appeal, or on the dismissal thereof, not exceeding the sum of Two Hundred Fifty and no/100 Dollars (\$250.00), then this obligation to be void; otherwise to remain in full force and effect.

/s/ HARRY JONES,

/s/ CARRIE JONES.

UNITED STATES INSUR-
ANCE COMPANY,

[Seal] By /s/ GEORGE M. LEMON,
Attorney-in-Fact,
and Resident Agent.

[Endorsed]. Filed August 4, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS RELIED UPON
ON APPEAL

The Appellant states that in his appeal to the United States Court of Appeals for the Ninth Circuit, from the judgment entered in the above-entitled case on June 10, 1954, and the Order Denying plaintiff appellant's Motion for Judgment Notwithstanding the Decision of the Court or in the Alternative for a New Trial, entered in the above-entitled Court on July 19, 1954, pursuant to the provisions

of rule 75(d) of the Rules of Civil Procedure, plaintiff appellant intends to rely on the following points:

1. The trial court erred in finding and concluding that plaintiff appellant had failed to sustain the burden of proof that amended return and claim for refund were filed.

The trial court erred in failing to find that the amended return and claim for refund were filed within the three-year statute of limitations in the office of the Collector of Internal Revenue, Tacoma, Washington.

2. The conclusion of law No. 1 is not supported by the evidence nor by the Findings of Fact, and is contrary to law.

3. The trial court erred in failing to find or conclude that the affirmative evidence of proper mailing of the amended return and claim for refund, constituted proof of filing.

4. The trial court erred in granting judgment for defendant.

The trial court erred in failing to grant judgment for the plaintiff.

Dated this 9th day of August, 1954.

/s/ DWIGHT A. HALSTEAD,

/s/ JOHN S. MOORE,

Attorneys for Plaintiff Appellant.

[Endorsed]: Filed August 9, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF THE CLERK

United States of America,
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above cause, called for in Appellant's Designation filed on August 9, 1954.

Date of Filing and Title of Document:

- 7-24-53 Complaint.
- 9-21-53 Answer.
- 3- 9-54 Affidavit of Harry Jones.
- 3- 9-54 Affidavit of Carrie Jones.
- 4- 7-54 Affidavit of Herman Schweizer.
- 4-26-54 Plaintiff's Exhibit No. 1.
- 4-26-54 Plaintiff's Exhibit No. 2.
- 4-26-54 Plaintiff's Exhibit No. 3.
- 6-10-54 Findings of Fact, Conclusions of Law.
- 6-10-54 Judgment.
- 6-10-54 Motion for Judgment notwithstanding the decision of the Court, or in the alternative for a new trial.
- 7-19-54 Order denying motion.
- 7-19-54 Clerk's minutes of Court Trial.
- 8- 4-54 Notice of Appeal.
- 8- 4-54 Bond for Costs on Appeal.
- 8- 9-54 Statement of Points Relied Upon on Appeal.

8- 9-54 Designation of Portion of Record to
Constitute Record on Appeal.

In Witness Whereof, I have hereunto set my
hand and affixed the seal of said District Court at
Yakima in said district this 17th day of August, 1954.

[Seal] STANLEY D. TAYLOR,
Clerk.

By /s/ THOMAS GRANGER,
Deputy.

[Endorsed]: No. 14486. United States Court of
Appeals for the Ninth Circuit. Harry Jones, Ap-
pellant, vs. United States of America, Appellee.
Transcript of Record. Appeal from the United
States District Court for the Eastern District of
Washington, Southern Division.

Filed August 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

[Endorsed]: No. 14487. United States Court of Appeals for the Ninth Circuit, Carrie A. Jones, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Southern Division.

Filed August 20, 1954,

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals,
Ninth Circuit

No. 14487

CARRIE JONES,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

STIPULATION

It is Hereby Stipulated by and between Dwight A. Halstead and John S. Moore, attorneys for appellant, and William B. Bantz, United States Attorney for the Eastern District of Washington, and William M. Tugman, Asistant United States Attorney for said District, attorneys for the appellee, United States of America, that this case be consolidated and docketed with the case of Harry Jones vs. United States of America, No. 835, and the said cause be heard on appeal upon a consolidated transcript of the record, and judgment in this case to be governed by the judgment in the case of Harry Jones vs. United States of America, No. 835. Only one bond in the sum of \$250.00 shall be required in the appeal of this matter, pursuant to the terms of Rule 73(c), said bond to be posted by Harry Jones and Carrie Jones, jointly.

Dated this 6th day of August, 1954.

/s/ WILLIAM B. BANTZ,
United States Attorney;

/s/ WILLIAM M. TUGMAN,
 Assistant United States Attorney, Attorneys for
 Appellee, United States of America.

/s/ DWIGHT A. HALSTEAD,

/s/ JOHN S. MOORE,

Attorneys for Appellant,
 Harry Jones.

[Endorsed]: Filed August 20, 1954.

United States
Court of Appeals
FOR THE NINTH CIRCUIT

HARRY JONES, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

CARRIE A. JONES, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

BRIEF OF APPELLANTS

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

FILED

NOV 29 1954

PAUL P. O'BRIEN,

CLERK

DWIGHT A. HALSTEAD
JOHN S. MOORE
E. F. VELIKANJE

Attorneys for Appellants

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Nos. 14486-14487

United States
Court of Appeals
FOR THE NINTH CIRCUIT

HARRY JONES, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

CARRIE A. JONES, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPEALS FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN DIVISION

BRIEF OF APPELLANTS

JURISDICTION

These actions, consolidated in the District Court and in this Court, involve income taxes paid by the appellants, Harry Jones and Carrie A. Jones, husband and wife, for the calendar year 1946 totalling \$3195.58 (R. 3, 7, 40). These taxes were paid on or about January 13, 1947 to the Collector of Internal Revenue at Tacoma, Washington, being in the sum of \$1526.54 for Harry Jones and in the sum of \$1669.04 for Carrie Jones (R. 3, 7). Claims for refund and amended returns were mailed to the Collector of Internal Revenue, Tacoma, Washington, on or about

January 15, 1947 (R. 3, 8, 9); amended claims were mailed to the Collector of Internal Revenue, Tacoma, Washington, on or about September 15, 1951 for Harry Jones (R. 3, 9, 11), and on or about November 18, 1952 for Carrie Jones (R. 11-12). No formal action having been taken on such claims, suits for refund were instituted July 24, 1953 (R. 4), in conformance with 26 U. S. Code, section 3772. The District Court assumed jurisdiction of the cases under 28 U. S. Code, section 1346 (a) (1), (R. 3), although appellee defended on the ground of lack of jurisdiction by reason of appellants' failure to timely file claims for refund as required by 26 U. S. Code, section 3772 (a) (1). (R. 4-5). Judgments sustaining appellee's position were entered June 10, 1954 (R. 34-35). Following the entry of orders denying appellants' motions for judgment notwithstanding the decision of the court or in the alternative for new trial (R. 38-39), appellants filed timely Notice of Appeal in each case (R. 41-42), and filed bond for costs on appeal (R. 43-44), pursuant to stipulation (R. 49), and 28 U. S. Code, section 1291, upon which the jurisdiction of this Court is based.

QUESTION INVOLVED

These appeals present the question of whether proof of mailing of a claim for refund of income taxes, postage prepaid, via the United States Mail, in an envelope securely sealed and addressed to the Collector of Internal Revenue, Tacoma, Washington, constitutes proof of filing of such claim for refund with the Collector of Internal

Revenue, Tacoma, Washington, when such proof is opposed solely by evidence that a search of all pertinent files discloses no record of having received such claim.

STATUTE INVOLVED

26 U. S. Code, section 322 (b) (1):

“Period of Limitation. Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later. . . .”

26 U. S. Code, section 3772 (a) (1):

“No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations or the Secretary established in pursuance thereof.”

STATEMENT

These cases are brought to this Court on appeals from the judgments in favor of appellee and against the appellants in suits brought to recover overpayments of income taxes for the calendar year 1946. It was stipulated at trial that the cases be consolidated and that the determination of *Carrie A. Jones v. United States of Amer-*

ica, No. 836, would rest upon the decision in *Harry Jones vs. United States of America*, No. 835. (R. 40). On appeal to this Court, it has been stipulated that the cases be consolidated for hearing and determination (R. 49).

By agreement between the parties, trial in the District Court and briefs and arguments on appeal will be limited to the issue presented herein, and that, inasmuch as the overpayment by appellants is an admitted fact and the amount may be computed mathematically, no determination was required in the District Court nor is required on appeal to this Court as to the amount of refund to which appellants might be entitled, should such become material.

By stipulation of the parties at the trial, it was agreed that the affidavits of Harry Jones, Carrie Jones, and Herman Schweizer would be received in evidence and treated as though the affiants therein had been present in Court and testified as to the facts set forth in the affidavits (R. 40).

The evidence presented by appellants was as follows. At all times material to these cases, Harry Jones and Carrie A. Jones have been husband and wife and residents of Benton County, Washington (R. 6). In January of 1947, appellants delivered to one Louis Harrison, public accountant, their records of income and expenses during the calendar year 1946 for the purpose of having Mr. Harrison draw their 1946 Federal income tax returns and

compute their income tax liability (R. 7). Following completion of Mr. Harrison's work, appellants on or about January 13, 1947, each received and signed their separate returns and mailed them in a single envelope to the Collector of Internal Revenue, Tacoma, Washington, together with a check in the sum of \$3,195.58 for the payment of their total combined tax liability as computed (R. 7, 30). These returns and the check were received by the Collector and the income taxes for appellants thereby paid (R. 15).

A day or so after January 13, 1947, Harry Jones noted an error in the copies of the appellants' income tax returns in that the gross income set forth was incorrect, resulting in an incorrect and excessive computation of tax liability for appellants (R. 8). Appellant Harry Jones thereupon went to Mr. Harrison with the copies and pointed out the mistake. Mr. Harrison then re-computed the gross income, net income and tax liability for appellants and completed one amended return, and one claim for refund for each of appellants, together with carbon copies thereof (R. 8, 17-20, 25). These amended returns and claims for refund were signed by appellants and were then mailed by appellant Harry Jones in a single envelope, securely sealed, postage prepaid in the United States Post Office at Prosser, Washington, addressed to the Collector of Internal Revenue, Tacoma, Washington, which mailing occurred about January 15, 1947 (R. 8-9). The carbon copies of the claims for refund and amended returns,

retained by appellants, were placed in evidence as Exhibits 1 and 2 (R. 17-20, 25-26).

In January, 1951, appellants having heard nothing further on their claims, consulted with an attorney and the Treasury Department and thereafter ascertained that there was no record of the receipt of the amended returns and claims for refund by the Collector of Internal Revenue. On or about October 10, 1951, appellant Harry Jones filed with the Collector of Internal Revenue, Tacoma, Washington, an amended claim for refund, (R. 9, 21-23). and on or about November 18, 1952, appellant Carrie Jones likewise filed an amended claim for refund (R. 27-29). It should be noted that although the original claims for refund and amended returns were somewhat inexpertly completed, the demands for refund were as follows: for Harry Jones, \$1082.54 (R. 17-20), and for Carrie Jones, \$1225.04 (R. 25-26). By the amended claims, Harry Jones sought the refund of \$1082.54 (R. 21-23), and Carrie Jones sought the refund of \$1120.04 (R. 27-29).

No formal action having been taken on either the claims for refund or the amended claims for refund, appellants then instituted their suits for refund on July 24, 1953.

Opposing the above evidence of appellants, appellee presented evidence, likewise in affidavit form, that according to the records of the Collection Division of the

Seattle District Director's office at Tacoma, Washington (a) the records indicated that appellants' 1946 returns were received with payment of tax on January 14, 1947; (b) a search of all pertinent files revealed no record of having received claims for refund or amended returns prior to March 15, 1950, being the expiration date of the Statute of Limitation for the calendar year 1946; (c) the amended claims for refund were received October 10, 1951 and November 18, 1952 (R. 15).

As previously set forth, the sole question presented to the District Court and to be presented on appeal to this Court, by agreement of the parties, is whether appellants have sustained the burden of proving the filing of claims for refund in January, 1947, or, as contemplated by the statute, prior to March 15, 1950, the termination date of the statutory period of limitations.

Appellee, United States of America, took the position that the amended returns and claims for refund had never been filed with the Collector for the reason that no record of receipt could be found; therefore, the Statute of Limitations, (26 U. S. Code, section 322 (b) (1)), prevented the suit under 26 U. S. Code, section 3772 (a) (1), and thus prevented recovery by appellants.

In rendering judgment against appellants (R. 34-35), the District Court, after finding as facts that the mailing of the amended returns and refund claims had occurred as testified by appellants, and that the Collector had no

record of the receipt of such documents (R. 32), concluded that the appellants had failed to prove filing of the claims within the period of the three year statute of limitation, that proof of mailing was not proof of filing, and that the filing of a claim for refund "is not complete until the document is delivered and received by the proper official and filed by him" (R. 32-33). The appellants now appeal to this Court for a review of the decision of the District Court.

STATEMENT OF POINTS TO BE URGED

The statement of points relied upon by appellants appears in the record at pages 44-45. The points may be summarized as follows: That the Court below erred (1) in finding and concluding that the appellants' evidence of mailing the amended returns and claims for refund on or about January 15, 1947 was insufficient to sustain the burden of proof that the amended returns and claims for refund were filed with the Collector of Internal Revenue; that such evidence was overcome by appellee's evidence of inability to find any record of filing such amended returns and claims; that filing of such documents is incomplete until received by the proper official and filed by him; and that such conclusions are not supported by the evidence nor the law applicable thereto; and (2) in failing to conclude that appellants' evidence of mailing of said claims for refund on or about January 15, 1947 constituted proof of filing said claims within the required

statutory period and prior to suit, thereby satisfying the jurisdictional requirements of the law and entitling appellants to recovery.

SUMMARY OF ARGUMENT

The statutes set forth herein require the filing of a claim for refund not later than March 15, 1950 by appellants, which claims must be filed with the Commissioner or the Collector of Internal Revenue. On or about January 15, 1947, appellants mailed such claims for refund in an envelope, securely sealed, postage prepaid, and addressed to the Collector of Internal Revenue, Tacoma, Washington. Such evidence constitutes proof of receipt and filing unless rebutted. Evidence of inability to find any record of receipt or filing by the Collector of Internal Revenue does no more than raise a presumption of non-receipt and non-filing, is not proof of non-receipt, and does not overcome the presumption of receipt and filing. Appellants, having presented proof of filing of claims for refund within the statutory period, have satisfied the jurisdictional requirements for suit established by 26 U. S. Code, section 3772 (a) (1), and are entitled to recover their overpayment of taxes.

ARGUMENT

Appellants' evidence raised a presumption of timely filing of their claims for refund.

Under the laws of the United States applicable to this matter, appellants were required to file claims for

refund of overpayment of Federal income taxes for the calendar year 1946 not later than March 15, 1950. Failure to file claims for refund within such period would constitute non-performance of a condition required prior to the institution of suit for refund, would prevent any refund whatsoever, and would be a jurisdictional lack in such a suit.

As previously set forth, appellants presented evidence at the trial and the Court found as a fact that appellants had mailed claims for refund to the Collector of Internal Revenue, Tacoma, Washington, postage prepaid, within the statutory period, being on or about January 15, 1947. That such proof raises a presumption of receipt is supported by the ruling in *Augerinion v. First Guaranty Bank*, 252 Pac. 535, 142 Wash. 73, wherein the Washington Supreme Court stated, at page 78:

“But the presumption is that the government mails proceed in due course, and that a letter duly addressed to a person with the postage thereon, fully paid, is received by the person to whom it is addressed. This presumption has the force of evidence and is sufficient to justify finding that such is the fact in the absence of anything to the contrary.”

This ruling of the Washington Supreme Court is also recognized by the Federal courts when considering factual situations such as in the instant case. In *Hudson v. United States*, 92 F. Supp. 555, the District Court of Louisiana was presented evidence by the parties in a manner similar to the cases here being considered in that affidavits were

presented to the Court and by agreement were received as evidence as if testified to by the parties. Taxpayers submitted copies of claim for refund and letter of transmittal which were mailed to the Collector of Internal Revenue within the statutory period. The evidence of the United States by the Collector of Internal Revenue demonstrated that upon an examination of the records of the Collector's office it was discovered that such claims were never filed in nor received by his office. The Court concluded from this evidence, at page 560, that:

“ . . . the claims were timely prepared and mailed, but a check of the Collector's office fails to show any record thereof.”

Thereafter the Court discusses the legal consequences of such a situation and says:

“There is unquestionably a presumption, when positive proof of the preparation and placing in the U. S. mails of a letter or document is submitted, that it was received by the one to whom it was addressed, in the absence of convincing evidence to the contrary.”

After considering many other cases involving this type of problem, the Court concluded that the preponderance of the evidence was that the claims did reach the office of the Collector, that such satisfied the requirement of filing, and that taxpayers should recover because:

“It cannot be believed that a just government would take advantage of this technical defense to deny to its citizens that which all considerations of equity and fair dealing would seem to demand.” (Page 563).

See also *Crude Oil Corp. v. Commissioner of Internal Revenue*, 161 F. (2d) 809, 810, wherein it is said with reference to the filing of a capital stock tax return:

“When mail matter is properly addressed and deposited in the United States mails, with postage duly prepaid thereon, there is a rebuttable presumption of fact that it was received by the addressee in the ordinary course of mail.

“The presumption of receipt is a strong one. A finding in opposition to such inference of fact, absent evidence of nonreceipt, is against the weight of the evidence.

“Proof of the due mailing is prima facie evidence of receipt.”

In *Haag v. Commissioner of Internal Revenue*, 59 F. (2d) 516, a question arose as to whether or not a letter had been received by the Commissioner, evidence having been presented that a letter was written and mailed to the Commissioner. At page 517, the Circuit Court of Appeals, Seventh Circuit, said:

“We are satisfied that the evidence necessitated a finding that the letter was sent as testified by petitioner. . . . As we view the question, it is one of presumption. As we are satisfied that the letter was mailed, the presumption arises that it was received. It follows, therefore, that we must assume that the letter was received by the Commissioner and later apparently lost or misplaced.”

The evidence of appellants herein and the finding of the Court was that appellants mailed the amended returns and claims for refund to the Collector within a few days

of having mailed the original returns. As additional evidence, carbon copies of the amended returns and claims for refund were introduced in evidence. There is thus no question but that appellants did execute and mail the amended returns and claims for refund within sufficient time for the instruments to be received by the Collector even before the statutory period had commenced to run, because the original returns and payment check, mailed on January 13, 1947, were received in the normal course of the mails, on January 14, 1947. The presumption of receipt satisfied the requirement of proof of receipt which in turn satisfied the requirement of filing of the claims.

“Delivery to and receipt by” constitutes “filing” under the statutory requirements.

As previously recited, the Court, in the Conclusions of Law (R. 33), applied a rule that “filing is not complete until the document is delivered and received by the proper official and filed by him.” The statutory requirements do not support such a rule of filing by the proper official. The statutory wording is (a) that a claim for refund must be filed “by the taxpayer” within the three year period (26 U. S. Code, section 322 (b) (1)), and (b) that no suit shall be maintained until a claim has been “filed with the Commissioner” pursuant to statutes and regulations (26 U. S. Code, section 3772 (a) (1)). “Filing with the Commissioner” has, of course, been extended to include the Collector, and the present successors, the Director and

District Director. The act of filing by the Collector or Commissioner is merely an administrative act to be performed by the recipient of the claim. "Filing" in the sense contemplated by these statutes can only be delivery to or receipt by, for the taxpayer can certainly not be held to the duty of following his claim into the internal, administrative handling of that instrument. Such a requirement would not only be ridiculous, but impossible. The rulings in the Hudson case, Crude Oil Corp. case, and Haag case, *supra*, while not spelling out that filing is accomplished by delivery, do establish such a rule by their ultimate decisions. This is also true of all other cases cited hereafter in this Brief by appellants. It is apparent that the Court erred in its Conclusion that filing was incomplete until filed by the official to whom addressed, and that proof by appellants of receipt constituted proof of filing as contemplated by the statutes.

The presumption of receipt by and filing with the Collector of Internal Revenue was not rebutted by appellee's evidence.

The presumption of receipt can only be rebutted by evidence of non-receipt. As stated in 20 *Am. Jur.* 200, Evidence, section 201:

"The presumption that a letter properly mailed was received by the addressee is not conclusive, but may be rebutted by evidence showing that the letter was not in fact received."

Appellee therefore had the burden of showing by evidence

that the claims for refund were not received and could not do so by merely raising a presumption that they were not received. This evidence of appellee was not, however, that the claims were not received, rather that evidence was:

“A search has been made of all pertinent files and there is no record of having received Claims or amended returns prior to the expiration date of the Statute of Limitation, which for the calendar year 1946, is March 15, 1950.” (R. 15).

Such a statement means no more than that the Chief of the Accounting Branch of the Collection Division of the Seattle District Director's office is unable to find any record of the receipt of the claims or amended returns. It does not mean that such were not received. This statement, without even advising as to who made the search, does no more than create a presumption of non-receipt.

In *Arkansas Motor Coaches v. Commissioner of Internal Revenue* 198 F. (2d) 189, the Court of Appeals, Eighth Circuit, was faced with the question of whether or not a taxpayer had filed a petition for review of a Collector's ruling with the Tax Court within the statutory period. Although in that case, the petition arrived at the Tax Court and the dispute was as to its arrival date, the distinction is unimportant in that proper mailing has been found by the Court as a fact in the instant case. At page 191, the Court stated:

“Acting in good faith and with due diligence petitioner

entrusted its petition to the United States mails for transportation from Dallas, Texas, to Washington, D. C., in ample time so that it could be filed and served within the ninety days from the mailing of the notice of rejection of its claim by the Commissioner. It used the same agency for transmitting its petition as the Commissioner had used in transmitting his notice. Where, as in this case, matter is transmitted by the United States mails, properly addressed and postage fully prepaid, there is a strong presumption that it will be received by the addressee in the ordinary course of the mails. . . . *While the presumption is a rebuttable one it is a very strong presumption and can only be rebutted by specific facts and not by invoking another presumption.*" (Italics ours).

.

"In the instant case there was a strong presumption that this petition was received in Washington, D. C., on the 31st day of January, 1951. What evidence is there that it was not received by the addressee on that date? There is the docket entry. The clerk did not testify that he in fact received the petition on that date and the correctness of the docket entry is bottomed on the presumption that an officer properly performs his duty but this is simply a presumption and not the kind of evidence sufficient to overcome the strong presumption that the mail was received by the addressee on January 31, 1951, which was several days before the expiration of the ninety day period within which it should have been filed."

See also *Central Paper Co. v. Commissioner of Internal Revenue*, 199 F. (2d) 902, wherein the Court refers to the presumption of receipt, and at page 904, states:

"The presumption is not rebutted by the fact that the letter might possibly have been lost or misplaced by postal employees before delivery to the mail box of The Tax Court, in the absence of any evidence as to when it was placed on the ledge beside the mail

box, or when it came into the possession of the messenger from The Tax Court."

In *J. H. Williams & Co. v. United States*, 48 F. (2d) 672, the Court of Claims was required to make a determination as to the filing of a claim for refund, prior to the expiration of the statutory period. The evidence of taxpayers showed delivery to the chief of the amortization section of the Bureau of Internal Revenue of amended return, schedules, amortization claim and claim for refund, together with a letter of transmittal which referred to all papers filed except the claim for refund. Testimony on behalf of the United States, by an employee of the claims control section of the Bureau of Internal Revenue whose duty it was to make card records of all claims, was to the effect that she was unable to find any record of the claim for refund. At page 674, the decision states:

"We have no reason to disbelieve anything testified to by the defendant's witness. We think all that she said is true, but her testimony shows nothing more than that she could find no card record of a claim for refund having been filed by plaintiff on February 10, 1922, but this testimony does not controvert the positive fact established by the plaintiff that the claim was prepared and filed. It is quite probable that, with the many thousands of cases, documents and claims pending and being constantly considered and audited in the Bureau of Internal Revenue, the claim of this plaintiff, having been attached to an amended return and transmitted directly to the amortization section instead of through the office of the collector of internal revenue, as is the usual custom, became misplaced, lost, or associated with some other file of some other

taxpayer when it was detached from the amended return and amortization claim."

For additional cases relating to the rebuttal of the presumption of receipt, see *Eakins v. United States*, 36 F. (2d) 961; *Merchants & Mfrs' Ass'n v. First Nat'l Bank*, 40 Ariz. 531, 14 P. (2d) 717; *Click v. Sample*, 73 Ark. 194, 83 S. W. 932; *Ripley Nat. Bank v. Latimer*, 64 Mo. App. 321; 91 A. L. R. 161, Annotation.

The foregoing cases establish two rules applicable hereto: (1) proof of mailing establishes a strong presumption of receipt and thus filing of a claim; (2) this presumption can only be rebutted by evidence of non-receipt, and cannot be rebutted by a presumption.

The facts established and found by the Court proved mailing of the claims for refund, and thereby created the strong presumption that the Collector of Internal Revenue, Tacoma, Washington, received the claims for refund. Such constitutes proof of compliance with the requirements regarding filing of claims. In attempting to rebut this proof, appellee has failed because appellee presented no evidence of non-receipt. Appellee's evidence, at its very strongest, merely creates a presumption of non-receipt; that is, the party who searched the pertinent files has been unable to find any record of the claims and it is therefore presumed that no claims were received. However, under the rules of the cases cited herein, appellee's presumption is insufficient to set aside appellants' proof.

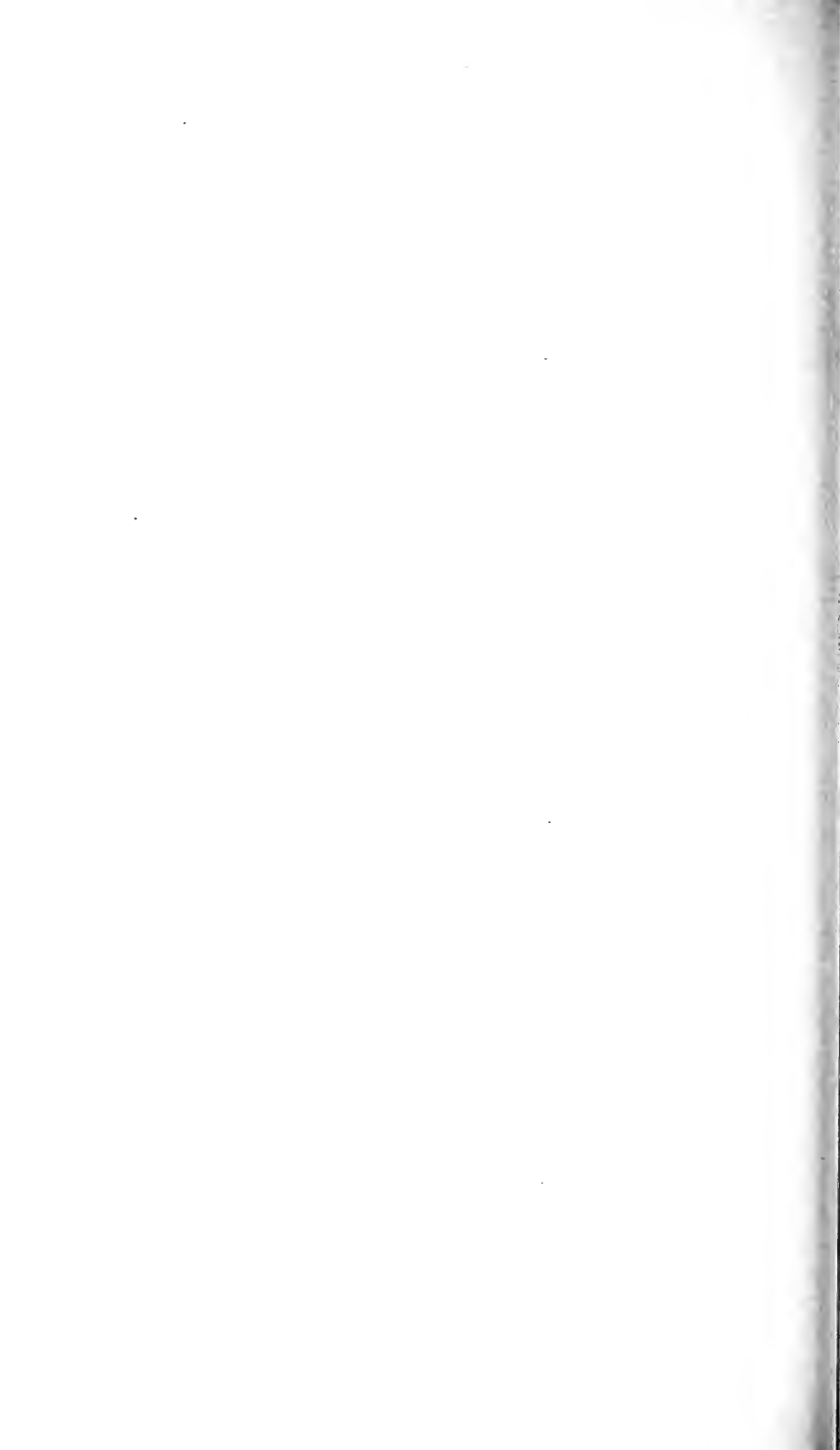
CONCLUSION

On the basis of the foregoing, it is submitted that the District Court erred in dismissing appellants' suits for refund and in failing to grant judgments in favor of appellants and against appellee.

Respectfully submitted,

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IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

HARRY JONES, *Appellant,*

vs.

UNITED STATES OF AMERICA *Appellee.*

CARRIE A. JONES, *Appellant,*

vs.

UNITED STATES OF AMERICA *Appellee.*

BRIEF OF APPELLEE

*Appeals from the United States District Court
for the Eastern District of Washington
Southern Division*

WILLIAM B. BANTZ,
United States Attorney.

WILLIAM M. TUGMAN,
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FILED

DEC 24 1954

PAUL P. O'BRIEN,
CLERK

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BRIEF OF APPELLEE

JURISDICTION

The statement of jurisdiction as set forth in the appellants' brief, with reference to the statutes therein indicated, is accepted as accurate.

STATUTES INVOLVED

26 U. S. Code, Section 322 (b) (1):

“Period of Limitation. Unless a claim for credit or refund is filed by the taxpayer within three years from the time the return was filed by the taxpayer or within two years from the time the tax was paid, no credit or refund shall be allowed or made after the expiration of whichever of such periods expires the later . . .”

26 U. S. Code, Section 3772 (a) (1):

“No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations or the Secretary established in pursuance thereof.”

26 Code of Federal Regulations, Section 39.322-7:

“*Limitations upon crediting and refunding of taxes paid; general rule.* (a) Unless a claim for credit or refund of an overpayment is filed within three years from the time the return was filed by the taxpayer or within two years from the time the tax is paid, the Commissioner is prohibited from allowing or making a credit or refund of income tax imposed by chapter 1 for such year after both periods have expired. If no return is filed by the taxpayer, the Commissioner is prohibited from allowing or making a credit or refund of such tax after two years from the time the tax was paid unless, before the expiration of such 2-year period, a claim therefor is filed. * * *”

ADDITIONAL STATEMENT OF FACTS

In order that the questions involved may be better pointed out, it is deemed necessary that the evidence should be summarized.

The salient facts to be drawn from the evidence are:

1. On January 13, 1947, Harry Jones and Carrie A. Jones, appellants herein, mailed their income tax returns for the calendar year 1946 to the Collector of Internal Revenue, Tacoma, Washington (R. 7, 13). Mailed with the returns was Harry Jones' check in the sum of \$3,195.58 in full payment of the 1946 tax liability of Harry and Carrie Jones (R. 30).

2. On January 14, 1947, the income tax returns and payment were received by the Department of Internal Revenue, Tacoma, Washington.

3. On or about January 15, 1947, appellants discovered a mistake in their income tax returns for 1946 and caused amended returns and claims for refund to be prepared and executed.

4. On or about January 15, 1947, Harry Jones placed the originals of the amended returns and claims for refund in a securely sealed envelope (R. 8, 13) addressed to the Collector of Internal Revenue, Tacoma, Washington, and placed the envelope with postage

prepaid thereon in the United States mail at Prosser, Washington (R. 8, 14).

5. A search of the records of the Seattle District Director's office of the Department of Internal Revenue, Collection Division, Tacoma, Washington, revealed no record of the receipt of the amended returns or claims for refund received prior to March 15, 1950 (R. ~~8~~, 15). Records of the Collection Division show receipt of amended returns and claims for refund for 1946 for Harry Jones on October 10, 1951, and for Carrie Jones more than one year later, on November 18, 1952.

QUESTIONS INVOLVED

Because of the nature of the evidence in this case, it is felt that three questions are presented for determination, to-wit:

1. Is bare evidence of mailing, unsupported by any other evidence, sufficient to prove receipt of mailed matter?
2. Does evidence of nonreceipt rebut the presumption of receipt raised by evidence of mailing?
3. What constitutes filing within the meaning of 26 U. S. C. 322 (b) (1) and 26 U. S. C. 3772 (a) (1)?

SUMMARY OF ARGUMENT

The sole evidence of mailing in the instant case is found in the affidavits of appellants. This evidence was not controverted. The District Court properly found that amended returns and claims for refund had been mailed. It follows then, that a presumption of receipt by the addressee arose. To rebut the presumption of receipt appellee introduced evidence of nonreceipt which was not controverted. Thus a question of fact as to receipt was raised. The burden of proving receipt fell upon the party asserting receipt, the appellants.

No evidence corroborative of mailing or to show receipt was introduced by appellants to enable them to meet their burden of proof. Even if appellants' evidence is viewed in its most favorable light, this evidence, considered together with that of appellee, raises only a question of fact as to receipt. It is submitted that appellee's positive and undisputed evidence of nonreceipt completely rebuts the presumption of receipt.

The ultimate question to be decided is whether there was a filing within the meaning of 26 U. S. C. 322 (b) (1) and 26 U. S. C. 3772 (a) (1). The record is completely bare of evidence which might show filing. Bare evidence of mailing is not sufficient to show filing. At best, appellants' evidence is inferential of receipt,

no more. To hold that a bare inference of receipt supports in addition an inference of filing is to draw an inference from an inference. This, it is submitted, cannot be done.

Appellee has been unable to find a single case which supports the theory that evidence of mailing standing alone raises a presumption that the mailed matter has been filed.

The requirement of filing under the provisions of 26 U. S. C. 322 (b) (1) and 26 U. S. C. 3772 (a) (1) is jurisdictional. The appellants having failed to sustain their burden of proof of showing filing, it is submitted that the judgment of the District Court should be affirmed.

ANSWER AND ARGUMENT TO APPELLANTS' ARGUMENT THAT "APPELLANTS' EVIDENCE RAISED A PRESUMPTION OF TIMELY FILING OF THEIR CLAIMS FOR REFUND"

Appellants have introduced evidence that amended income tax returns and claims for refund were properly addressed and mailed with postage prepaid to the Collector of Internal Revenue, Tacoma, Washington. This evidence is not disputed.

Appellee concedes that evidence of mailing raises a rebuttable presumption of fact that the mailed matter was received by the addressee in the ordinary course

of mail. *Crude Oil Corporation v. Commissioner of Internal Revenue*, 161 F. 2d 809, 810. The presumption, however, is one of receipt only; it is not a presumption of filing as appellants imply in their brief. Receipt and filing are two different and distinct things.

The general rule on rebuttal of the presumption is well stated in 20 Am. Jur., Evidence, Sec. 201:

“The presumption that a letter properly mailed was received by the addressee is not conclusive, but may be rebutted by evidence showing that the letter was not in fact received. The sufficiency of such evidence is generally a matter for the determination of the jury.

“There is authority to the effect that the presumption arising upon proof that letters were received by the defendant, which the plaintiff’s evidence shows to have been written, properly addressed, and mailed, is entirely overcome by the uncontradicted testimony of the defendant that the letters were never received.”

The rule is well supported by the cases.

The United States Supreme Court, in *Rosenthal v. Walker*, 111 U. S. 185, 195, states:

“The rule is well settled that if a letter properly directed is proved to have been either put into the post office or delivered to the postman, it is presumed, from the known course of business in the post office department, that it reached its destination at the regular time, and was received by the person to whom it was addressed. * * * *Huntley*

v. Whittier, 105 Mass. 391. As was said by Gray, J., in the case last cited, 'the presumption so arising is not a conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the government will do their duty and the usual course of business, and when it is opposed by evidence that the letters never were received, must be weighed with all the other circumstances of the case, by the jury in determining the question whether the letters were actually received or not.' "

In *Schutz v. Jordan*, 141 U. S. 213, 219, the United States Supreme Court approved a charge to the jury which read in part as follows:

"The fact that a letter is mailed does not, in court, establish the fact that the person it is mailed to received it. That is not proof of that fact. In certain transactions about protesting notes and charging endorsers of commercial paper and things of that sort, the mere fact of mailing a letter answers; but when a party is to be affected with knowledge of what is in the letter and the contents of it, and what goes with it, they must go further and prove not only that it was mailed, but that the party to whom it was addressed got it."

The court states further at page 220 as follows:

"So while the mailing of a letter creates an inference, raises a presumption that the party to whom it was addressed received it in due course of mail, and thus acquired knowledge of the matters stated therein, yet such presumption is one of fact, not of law. It is not conclusive, but subject to control and limitation by other facts."

Appellants apparently cite *Argerion v. First Guaranty Bank*, 252 Pac. 535, 142 Wash. 73; *Hudson v. United States*, 92 F. Supp. 555; *Crude Oil Corp. v. Commissioner of Internal Revenue*, supra; and *Haag v. Commissioner of Internal Revenue*, 59 F. 2d 516, for the proposition that the presumption raised by evidence of mailing is conclusive of receipt. The courts, in each of the cases cited by appellants, approve the general rule that the presumption raised by mailing is not conclusive but rebuttable. Each of the cited cases turns on its own facts, and merely illustrates application of the rule that the sufficiency of the evidence of mailing and nonreceipt is a question of fact to be decided by the jury or the trier of fact. It is to be noted that in each of the cases cited by appellants there was either evidence corroborative of mailing and receipt or a complete lack of evidence of nonreceipt.

The Supreme Court of the State of Washington has held repeatedly that the presumption of mailing can be rebutted by an affirmative showing of nonreceipt.

In *Ault v. Interstate Savings & Loan Association*, 47 Pac. 13, 15 Wash. 627, the court states at page 634 that:

“* * * while the testimony on the part of the plaintiff may have been sufficient to raise a presumption that it was received, that presumption was entirely overcome by the testimony on the part

of the defendant, which was to the effect that such letter had never been received. * * * A letter mailed to a person does not necessarily reach him, and while for convenience sake and from the necessity of business its reception will be presumed, this presumption flowing from the fact that letters usually reach their destination, can have little weight as against positive testimony to the effect that the letter was never received."

In *Collins v. Collins*, 151 Wash. 201, the Court states at page 210, that:

"The presumption of receipt of a letter deposited in the mail being no more than a prima facie presumption, is therefore offset by the positive evidence of nonreceipt. *Ault v. Interstate Savings & Loan Assn.*, 15 Wash. 627, 47 Pac. 13; *Gibson v. Rouse*, 81 Wash. 102, 142 Pac. 464."

Leahy v. United States, et al., 10 F. 2d 617, involved the proceeds of a war risk insurance contract wherein plaintiff alleged she superseded the original beneficiary. Plaintiff introduced evidence showing that the insured had mailed his notice of change of beneficiary to the Veterans Bureau at Washington two years prior to his death. The defendant introduced evidence that no such notice had been found in the bureau and that no such notice was recorded therein. The Circuit Court in affirming judgment for the defendant stated at page 618:

"Contrary to plaintiff's contention, mere mailing of notice does not suffice. If not by the Bu-

reau received, mailing goes for nothing, is not performance of the condition. * * *

“Plaintiff further contends that her case is established by the presumption that the notice duly mailed by insured was in ordinary course received by the Bureau. This would be conceded, but for that, if it be granted that due mailing is proven, the presumption to which plaintiff appeals fails for two reasons:

“First, if in the face of evidence the presumption has not served its office to dictate the burden of evidence, and thereupon disappears from the case, it is overcome by the statement of the Bureau (without interest, save justice and of avowed sympathy for plaintiff) that said notice was not by it received.

“Second, if said statement of itself is no more than inference from failure to find the notice in the Bureau, it is fortified by the presumption that, had said notice been received, it would have been preserved, recorded, and acknowledged in ordinary course, as law, regulation, and official duty required; and this latter presumption, in conflict with the former, of itself serves to meet, overcome, or evenly balance the former in the scales wherein evidence is weighed. * * *

“Both presumptions arise from the probability that ‘official duty has been regularly performed’ and that the ‘ordinary course of business has been followed,’ perhaps more from the latter, though both reasons have been assigned for the former presumption. See *Henderson v. Carbondale, etc., Co.*, 140 U. S. 37.

but are conditions under which the United States has consented to be sued. The burden was, therefore, upon appellee to have alleged and proven that it had complied with those conditions before its suit could be maintained. This burden it did not and cannot sustain under the facts. These requirements are jurisdictional and must be established by the person invoking the jurisdiction of the court. It is not incumbent upon the United States to specially plead such requirements as a defense, and the District Court should have dismissed the suit for want of jurisdiction."

The United States Supreme Court stated in *Rosenman v. United States*, 323 U. S. 658, 661, that:

"Claims for tax refunds must conform strictly to the requirements of Congress. A claim for refund of an estate tax 'alleged to have been erroneously or illegally assessed or collected must be presented to the Commissioner within three years next after the payment of such tax.' On the face of it, this requirement is couched in ordinary English, and, since no extraneous relevant aids to construction have been called to our attention, Congress has evidently meant what these words ordinarily convey. The claim is for refund of a tax 'alleged to have been erroneously or illegally assessed or collected,' and the claim must have been filed 'after the payment of such tax,' that is, within three years after payment of a tax which according to the claim was erroneously or illegally collected. The crux of the matter is the alleged illegal assessment or collection, and 'payment of such tax' plainly presupposes challenged action by the taxing officials."

In *Worden & Co., Inc. v. United States*, 22 F. Supp. 418, it was held that where the Commissioner found no record of a claim for refund had been filed, such finding was conclusive of nonfiling, the Court stating that the evidence shows that even though a claim may be lost some notation of its receipt should be filed in the files of the Commissioner. To the same effect is *Staten Island Ship Building Co. v. United States*, 33 F. Supp. 134.

At page 13 of appellants' brief, plaintiffs quote from *Hudson v. United States*, supra, to the following effect:

"It cannot be believed that a just government would take advantage of this technical defense to deny to its citizens that which all considerations of equity and fair dealing would seem to demand."

This argument is well met by the ruling of the Court in *Kavanagh v. Noble*, 332 U. S. 535, where the Court holds that it is for Congress, not the Courts, to provide remedies for inequities resulting from the application of limitations on refunds of Federal taxes, holding that a claim having been filed late under the terms of Section 322 (b) (1) of the Internal Revenue Code was barred by the statute of limitations.

"To file" is defined in Black's Law Dictionary as follows:

"To put upon the files, or deposit in the custody or among the records of a court. To deliver an in-

strument or other paper to the proper officer for the purpose of being kept on file by him in the proper place. * * *

“It is commonly held that the filing is complete when the paper is lodged with the proper officer, whose indorsement, though required of him as a duty, is unnecessary to complete the filing or to give validity to the paper filed.”

The United States Supreme Court, speaking through Mr. Justice Stone, in *United States v. Felt & Tarrant Manufacturing Company*, 283 U. S. 269, states at page 272:

“The filing of a claim or demand as a prerequisite to a suit to recover taxes paid is a familiar provision of the revenue laws, compliance with which may be insisted upon by the defendant, whether the collector or the United States. *Tucker v. Alexander*, 275 U. S. 228; *Maryland Casualty Co. v. United States*, 251 U. S. 342, 353, 354; *Kings County Savings Institution v. Blair*, 116 U. S. 200; *Nichols v. United States*, 7 Wall. 122, 130.”

The Court further states at page 273:

“The necessity for filing a claim such as the statute requires is not dispensed with because the claim may be rejected. It is the rejection which makes the suit necessary. An anticipated rejection of the claim, which the statute contemplates, is not a ground for suspending its operation. Even though formal, the condition upon which the consent to suit is given is defined by the words of the statute, and ‘they mark the conditions of the claimant’s right’.”

It is the contention of the appellee that the rule of the *Felt & Tarrant* case is applicable in the instant situation. The courts have consistently refused to accept jurisdiction in actions for the recovery of taxes where no claim for refund has been filed. See *Pacific Mutual Life Insurance Company of California v. United States*, 44 F. 2d 887; *Grandeur Building, Inc. v. Jarecki*, 92 F. Supp. 867; *United States v. Frauenthal*, 138 F. 2d 188; *Dixie Margarine Company v. Shaefer*, 139 F. 2d 221, cert. den. 321 U. S. 791.

In *United States v. Lombardo*, 241 U. S. 73, a criminal case, an indictment was attacked, one of the grounds of the attack being that the offense was committed in the district in which the indictment was found. The gist of the offense was the failure to file a statement with the Commissioner General of Immigration. It was the Government's contention that there was sufficient filing if the required statement was deposited in the post office of the United States, addressed to the Commissioner General, and forwarded through the usual course of mail. However, the court states at page 76:

"This contention cannot be reconciled with the language employed in the act. The word 'file' was not defined by Congress. No definition having been given, the etymology of the word must be considered and ordinary meaning applied. The word 'file' is derived from the Latin word '*filum*,' and relates to the ancient practice of placing pa-

pers on a thread or wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. 'Shall file' means to deliver to the office and not send through the United States mails. *Gates v. State*, 128 N. Y. Court of Appeals, 221. A paper is filed when it is delivered to the proper official and by him received and filed. Bouvier Law Dictionary; *White v. Stark*, 134 California, 178; *Westcott v. Eccles*, 3 Utah, 258; *In re Van Varche*, 94 Fed. Rep. 352; *Mutual Life Ins. Co. v. Phiney*, 76 Fed. Rep. 618. Anything short of delivery would leave the filing a disputable fact, and that would not be consistent with the spirit of the act."

The necessity of filing under the terms of 26 U. S. C. 322 (b) (1) and 26 U. S. C. 3772 (a) (1) is jurisdictional and must be established by the person invoking the jurisdiction of the court. Filing is not accomplished by mere mailing. At the very least filing requires actual delivery of the document to be filed to the official charged with filing. Appellee submits that not only have appellants failed to sustain their burden as to filing but have failed to introduce any evidence whatsoever of filing.

ANSWER AND ARGUMENT TO APPELLANTS' ARGUMENT THAT "THE PRESUMPTION OF RECEIPT BY AND FILING WITH THE COLLECTOR OF INTERNAL REVENUE WAS NOT REBUTTED BY APPELLEE'S EVIDENCE."

Appellants state at page 16 of their brief that "the presumption of receipt can only be rebutted by evi-

dence of nonreceipt." Appellee is in accord with this contention and submits that its evidence as to nonreceipt does rebut the presumption of receipt. Appellants further state that appellee had the burden of showing by the evidence that the claims for refund were not received (B. 16-17). To the contrary, the burden of going forward with the evidence does not shift, particularly where the mere inference of receipt raised by the evidence of mailing is disputed. The rule relating to the burden of proof is well stated in *Block, et al. v. Eastern Machine Screw Corporation*, 281 Fed. 777, where the court states at page 779 that:

"Proof of mailing a letter may, and usually does, raise a so-called presumption that it was received; but this is a disputable inference of fact, and the burden of proof is not thereby shifted to the addressee; it remains upon the one who must prove the notice effected by the letter."

To the same effect is *Farmers Ins. Exchange v. Taylor*, 193 F. 2d 756.

Even viewing appellants' evidence in its most favorable light, it cannot be said that mere evidence of mailing gives rise to an additional presumption of filing within the meaning of 26 U. S. C., Section 322 (b) (1), and 26 U. S. C., Section 3772 (a) (1).

Appellants place much weight on the case of *Arkansas Motor Coaches v. Commissioner of Internal Revenue*, 198 F. 2d. 189. In the *Arkansas* case, *supra*, it is

worthy of note that there was, in addition to evidence of mailing, evidence that the package mailed had been received in Washington within the statutory time. In fact, the package had been stamped "Rec'd. in bad condition at Washington, D. C.," in two places. Thus actual filing in the *Arkansas* case was delayed until only one day after the statute had run because of the negligence of postal employees in failing to forward the package. In the instant case evidence of receipt by anyone is entirely lacking. In fact, it is worthy of note that one of the appellants waited for almost four years and nine months and the other appellant waited almost five years and ten months before instituting any action on the claims for refund purportedly mailed by them.

In *J. H. Williams & Co. v. United States*, 48 F. 2d 672, another case upon which appellants place heavy reliance, the court found in addition to evidence of mailing that:

"The certified copies of the amended return and the letter referred to show evidence of the fact that they were fastened together, and they further show that they had been torn apart and the fastener removed." (Page 674.)

It is apparent that the court places great weight on the showing that the documents actually received had been torn apart and the fastener removed, it having been claimed by the plaintiff Williams that the refund

was fastened to the other documents. Based on the evidence of fastening and other testimony given by the plaintiff's attorney, the court was able to state at page 674 that:

"It is a fair inference that the employee of the amortization section did not properly route the refund claim to the claims control section for appropriate record there."

In the instant case the extent of proof which has been stipulated to by defendant is that there was a mailing. There is absolutely no other evidence of any nature to show actual receipt of a claim for refund or its filing.

Appellants also cite *Central Paper Co. v. Commissioner of Internal Revenue*, 199 F. 2d 902. The facts in the *Central* case do not square in any respect with the facts in the instant case. In the *Central* case there was evidence not only of mailing but also of receipt prior to the expiration of the statute of limitations, whereas in the instant case there was evidence of mailing only.

Eakins v. United States, 36 F. 2d 961 can be distinguished in that the court found that the parties had been in almost continuous contact from the time of the filing of the first claim and the alleged filing of the second claim. Though the government's testimony indicated no record of filing, it seems patent that the

court based its decision that there had been substantial compliance by the taxpayer on the fact that at no time was the government unaware of the taxpayers' contentions. In contrast, appellants in the instant case exhibited conduct amounting to laches in not pressing their claims for refund until four and five years after their purported mailing of amended returns and claims for refund.

Appellants rely on bare evidence of mailing only. This evidence does no more than raise a rebuttable presumption of receipt. Evidence introduced by the appellee, it is submitted, effectively rebuts this presumption. Appellants have introduced no evidence to sustain their burden of proving filing. The presumption of receipt raised by appellants' evidence of mailing certainly raises no presumption of filing. The jurisdictional requirement of filing is for the appellants to prove. They have not done so.

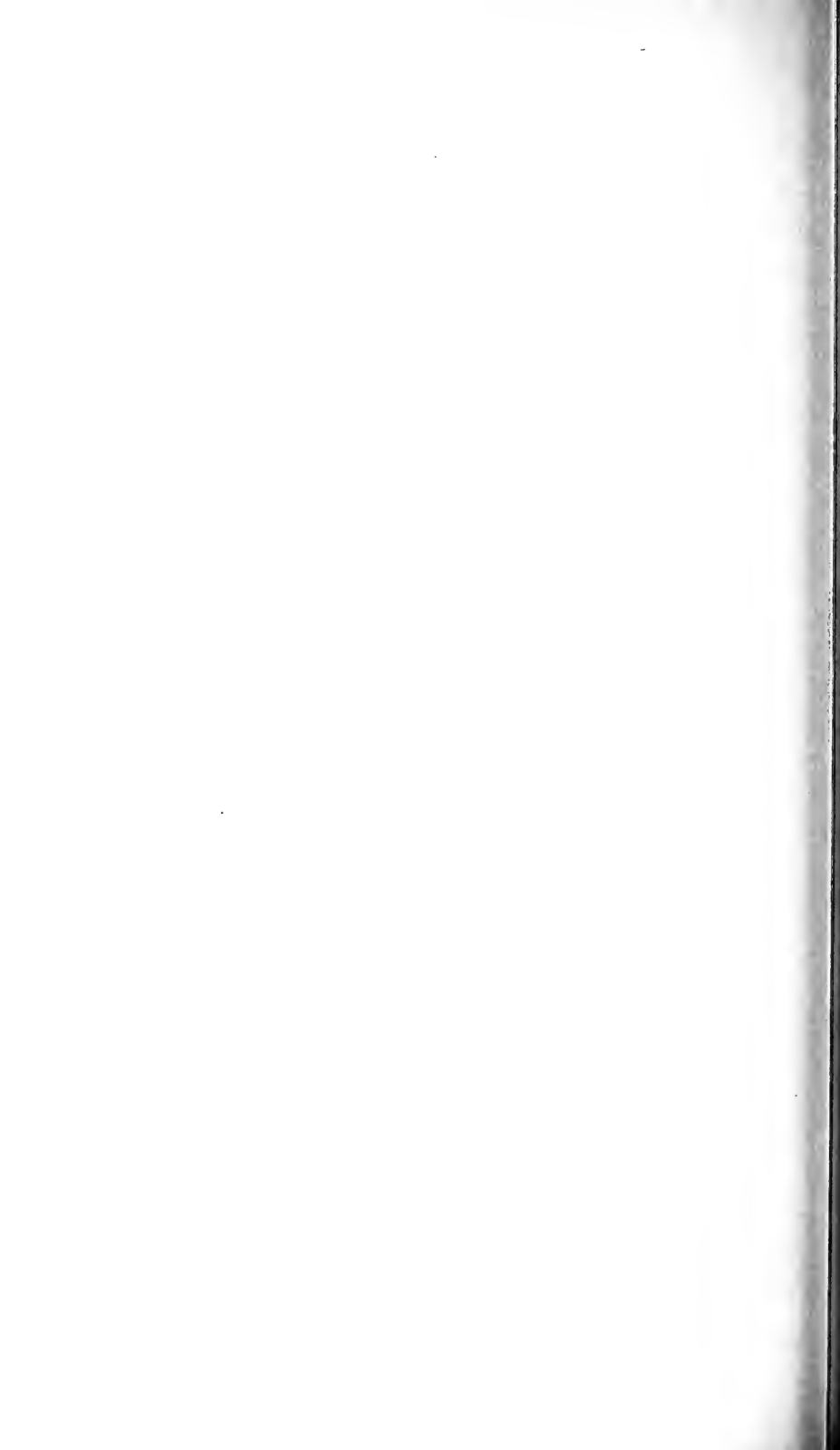
CONCLUSION

It is submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

WILLIAM B. BANTZ,
United States Attorney.

WILLIAM M. TUGMAN,
Assistant U. S. Attorney.



No. 14488

**United States
Court of Appeals**
for the Ninth Circuit

G. L. CURTIS COMPANY,

Appellant,

vs.

KENNETH S. HAMMES, Trustee in Bankruptcy
of the Estate of ORACLE ENGINEERING
AND SALES CORPORATION, a Corporation,
Bankrupt,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
District of Arizona**

FILED

NOV 15 1954

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—11-5-54

**PAUL P. O'BRIEN
CLERK**



No. 14488

**United States
Court of Appeals**
for the Ninth Circuit

G. L. CURTIS COMPANY,

Appellant,

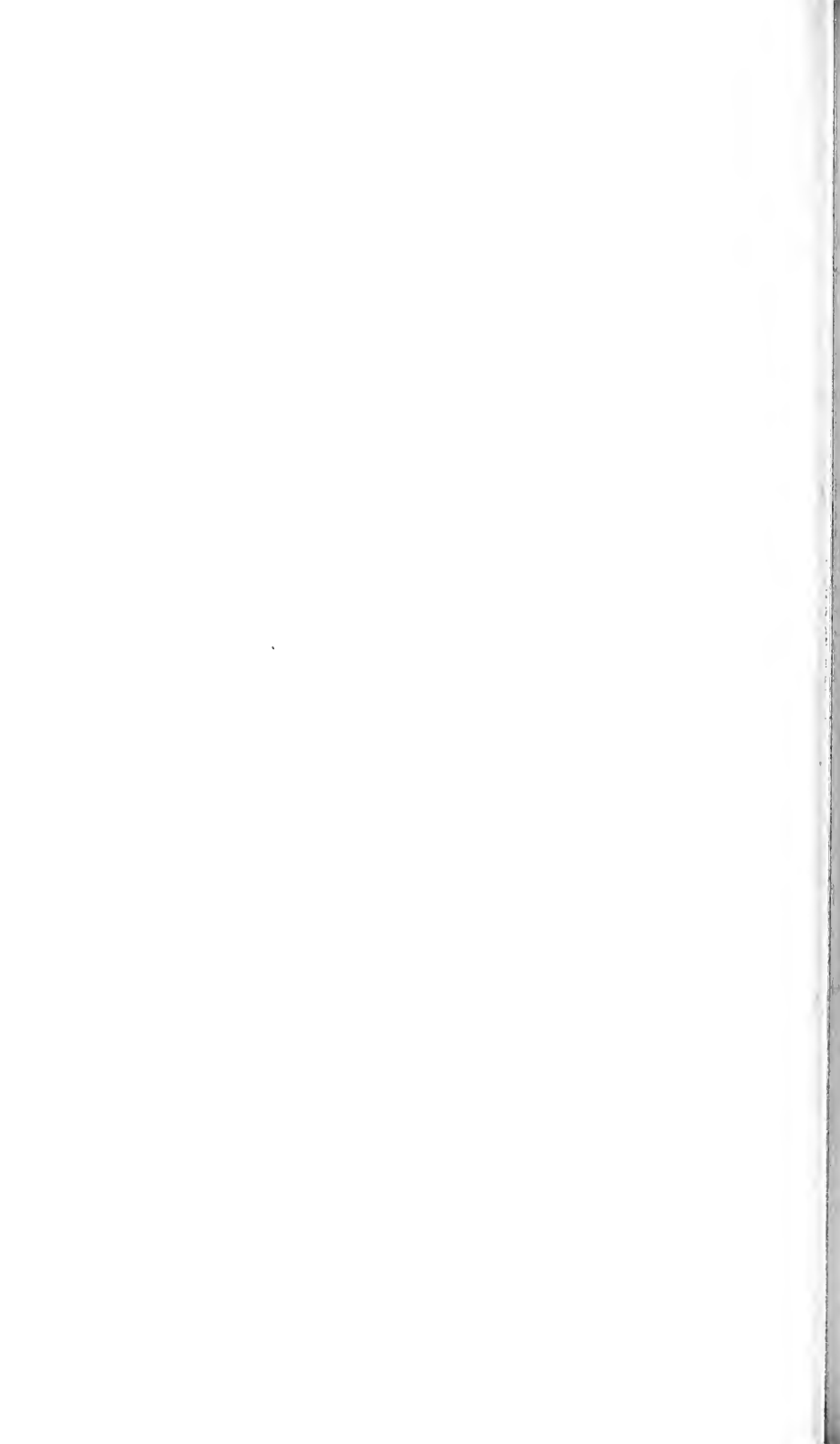
vs.

KENNETH S. HAMMES, Trustee in Bankruptcy
of the Estate of ORACLE ENGINEERING
AND SALES CORPORATION, a Corporation,
Bankrupt,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
District of Arizona**



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

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Attorneys for Appellee,
Kenneth S. Hammes, Trustee.



In the United States District Court
for the District of Arizona

No. B-641—Tucson

In the Matter of:

ORACLE ENGINEERING AND SALES CORPORATION, an Arizona Corporation,

Bankrupt.

PETITION OF G. L. CURTIS COMPANY FOR
REVIEW OF ORDER ENTERED BY THE
REFEREE ON THE 9TH DAY OF OCTOBER, 1953, GRANTING PETITION OF
THE RECEIVER TO SELL PERSONAL
PROPERTY

To the Honorable Stanley A. Jerman, Referee in
Bankruptcy:

The petition of G. L. Curtis Company respectfully represents:

I.

That your petitioner is aggrieved by the order herein of Stanley A. Jerman, Referee in Bankruptcy, dated the 9th day of October, 1953, a copy of which order is annexed hereto and marked Exhibit A, and by reference made a part hereof.

II.

That the Referee erred in his Finding of Fact No. 1, for the reason that said Finding of Fact is contrary to the evidence for the reason the Referee failed to find that the sum of \$6,500.00 was deliv-

ered to the Oracle Engineering and Sales Corporation in payment of the purchase price for certain personal property and the finding is contrary to the evidence which shows:

That M. E. Zetterholm and Ira L. Hart as Trustees who received the check drawn by G. L. Curtis Company, Exhibit No. 1, and delivered in exchange for the Bill of Sale executed by Oracle Engineering and Sales Corporation, Exhibit No. 3, received said money and used the same on behalf of Oracle Engineering and Sales Corporation in a revolving fund in the sum of \$30,000.00 theretofore paid into said fund by G. L. Curtis and which \$30,000.00 was considered as a loan secured by assignments of certain accounts of Oracle Engineering and Sales Corporation and was administered by said Trustees for the use and benefit of Oracle Engineering and Sales Corporation and was in addition to the \$30,000.00 theretofore paid into said fund and secured by said assignment.

III.

That the Referee erred in his Finding of Fact No. 2, for the reason that said Finding of Fact is contrary to the evidence in that the evidence shows:

That on the 6th day of March, 1952, G. L. Curtis Company executed and delivered to Oracle Engineering and Sales Corporation its check numbered 4, in the sum of \$6,500.00 payable to H. E. Zetterholm and Ira L. Hart, Trustees, Exhibit No. 1.

That in exchange for the check of G. L. Curtis Company, said Exhibit No. 1, Oracle Engineering and Sales Corporation executed its Bill of Sale to G. L. Curtis Company, Exhibit No. 3, on the 6th day of March, 1952, for the following items of personal property:

8166 pounds—69 sheets—.312 4130 steel

2864 pounds—25 sheets—.312 4130 steel

7532 pounds—62 sheets—5/16" x 18" x 72" 4130 steel

4732 pounds—40 sheets—5/16" x 18" x 72" 4130 steel

IV.

That the Referee erred in making his Finding of Fact No. 3 in that the finding is contrary to the evidence and the Referee in accordance with the evidence should have found:

That on the 6th day of March, 1952, G. L. Curtis Company executed and delivered to Oracle Engineering and Sales Corporation its check numbered 4, in the sum of \$6,500.00 payable to H. E. Zetterholm and Ira L. Hart, Trustees, Exhibit No. 1.

That in exchange for the check of G. L. Curtis Company, said Exhibit No. 1, Oracle Engineering and Sales Corporation executed its Bill of Sale to G. L. Curtis Company, Exhibit No. 3, on the 6th day of March, 1952, for the following items of personal property:

8166 pounds—69 sheets—.312 4130 steel

2864 pounds—25 sheets—.312 4130 steel

7532 pounds—62 sheets—5/16" x 18" x 72" 4130 steel

4732 pounds—40 sheets—5/16" x 18" x 72" 4130 steel

That on the said 6th day of March, 1952, the personal property described in the Bill of Sale executed by Oracle Engineering and Sales Corporation was in the possession of Allison Steel Manufacturing Company in Phoenix, Arizona;

That on the 14th day of March, 1952, Oracle Engineering and Sales Corporation notified Allison Steel Manufacturing Company that the property described in the Bill of Sale executed by Oracle Engineering and Sales Corporation on the 6th day of March, 1952, Exhibit No. 3, was the property of G. L. Curtis, by letter, Exhibit No. 4 herein;

That on the 20th day of March, 1952, Allison Steel Manufacturing Company acknowledged to Oracle Engineering and Sales Corporation that it recognized the property described in the Bill of Sale executed on the 6th day of March, 1952, Exhibit No. 3, as the property of G. L. Curtis;

That M. F. Zetterholm and Ira L. Hart as Trustees who received the check drawn by G. L. Curtis Company, Exhibit No. 1, and delivered in exchange for the Bill of Sale executed by Oracle Engineering and Sales Corporation, Exhibit No. 3, received said money and used the same on behalf of Oracle Engineering and Sales Corporation in a revolving fund in the sum of \$30,000.00 theretofore paid into said fund by G. L. Curtis and which \$30,000.00 was considered as a loan secured by assignments of certain accounts of Oracle Engineering and Sales Corporation and was administered by said Trustees for the use and benefit of Oracle

Engineering and Sales Corporation and was in addition to the \$30,000.00 theretofore paid into said fund and secured by said assignment.

V.

That the Referee erred in making his Finding of Fact No. 4 in that the finding is contrary to the evidence for the reason that said finding is not complete in that the Referee failed to also find according to the evidence that:

On the 14th day of March, 1952, Oracle Engineering and Sales Corporation notified Allison Steel Manufacturing Company that the property described in the Bill of Sale executed by Oracle Engineering and Sales Corporation on the 6th day of March, 1952, Exhibit No. 3, was the property of G. L. Curtis, by letter, Exhibit No. 4 herein;

On the 20th day of March, 1952, Allison Steel Manufacturing Company acknowledged to Oracle Engineering and Sales Corporation that it recognized the property described in Bill of Sale executed on the 6th day of March, 1952, Exhibit No. 3, as the property of G. L. Curtis.

VI.

That the Referee erred in his Finding No. 5 in that the correct statement of the law is:

The Bill of Sale executed by Oracle Engineering and Sales Corporation, Exhibit No. 3, to G. L. Curtis Company constituted a sale of the steel described in said Exhibit No. 3 to G. L. Curtis Company;

The Bill of Sale executed by Oracle Engineering and Sales Corporation to G. L. Curtis Company, Exhibit No. 3, constituted a transfer of the property of Oracle Engineering and Sales Corporation in exchange for a present fair consideration as defined by the Bankruptcy Act;

The transfer of the property of Oracle Engineering and Sales Corporation to G. L. Curtis Company did not constitute a preference under the provisions of the Bankruptcy Act.

VII.

The Referee erred in his Finding No. 6 in that the same is not a correct conclusion of law from the findings of the Referee in that the correct Conclusions of Law from said findings of the Referee are:

The Bill of Sale executed by Oracle Engineering and Sales Corporation to G. L. Curtis Company, Exhibit No. 3, constituted a transfer of the property of Oracle Engineering and Sales Corporation in exchange for a present fair consideration as defined by the Bankruptcy Act;

The notice to Allison Steel Manufacturing Company executed by Oracle Engineering and Sales Corporation, Exhibit No. 4, that the steel was the property of G. L. Curtis Company and the acceptance thereof by Allison Steel Manufacturing Company, Exhibits Nos. 5 and 6, constituted a change of possession within the terms of Section 62-502, Arizona Code Annotated, 1939;

The execution of the Bill of Sale, Exhibit No. 3, and the change of possession of the steel described therein constituted a pledge for the repayment to G. L. Curtis Company of the sum of \$6,500.00 paid by it to H. E. Zetterholm and Ira L. Hart, Trustees' Exhibit No. 1;

By the provisions of Section 62-523, A.C.A., 1939, the Bill of Sale being accompanied by change of possession, although intended to operate as a lien upon personal property instead of a transfer of ownership, was not required to be recorded to be valid against third persons or creditors of Oracle Engineering and Sales Corporation, and is not fraudulent or voidable by any creditor of the bankrupt, or by the Receiver herein pursuant to the provisions of the Bankruptcy Act;

G. L. Curtis Company is entitled to the possession of the steel described in Bill of Sale, Exhibit No. 3, until it is paid the sum of \$6,500.00 by Oracle Engineering and Sales Corporation, or the Receiver herein.

VIII.

The Referee erred in his failure to grant the petition of G. L. Curtis Company for a declaration that G. L. Curtis Company is the owner of the personal property described therein, a copy of which petition is attached hereto and by reference made a part hereof and marked Exhibit B.

IX.

The Referee erred in granting the Receiver's petition to sell the personal property, a copy of

which is attached hereto and by reference made a part hereof and marked Exhibit C, for the reason that said personal property is the property of G. L. Curtis Company.

X.

The Referee erred in failing to enter the Findings of Fact and Conclusions of Law and each thereof proposed by G. L. Curtis Company, a copy of which is attached hereto and by reference made a part hereof and marked Exhibit D.

XI.

The Referee erred in overruling the objections of G. L. Curtis Company to the Receiver's Petition to Sell Property, a copy of which objections is attached hereto and by reference made a part hereof and marked Exhibit E.

XII.

The Referee erred in overruling the objections of G. L. Curtis Company to the Findings and Order prepared by the Receiver a copy of which is attached hereto and by reference made a part hereof and marked Exhibit F.

Wherefore, your petitioner prays that said order of the Referee be reviewed by a Judge in accordance with the provisions of the Act of Congress relating to bankruptcy and that said order be reversed and that the personal property described in the petition of G. L. Curtis Company be declared to be the property of G. L. Curtis Company and that the Court find that the Receiver, Kenneth S.

Hammes, has no right, interest or claim of any kind or character to the said steel and that the Receiver be directed to surrender said steel to G. L. Curtis Company and that your petitioner have such other and further relief as is just.

G. L. CURTIS COMPANY,

By /s/ G. L. CURTIS,

President.

SCRUGGS AND RUCKER,

By /s/ EDWARD W. SCRUGGS,

Attorneys for Petitioner.

Duly verified.

EXHIBIT A

In the District Court of the United States
in and for the District of Arizona

No. B-641, Tucson

In the Matter of:

ORACLE ENGINEERING AND SALES CORPORATION, an Arizona Corporation,

Bankrupt.

FINDINGS AND ORDER

The petition of Kenneth S. Hammes duly appointed Receiver herein praying for an order of this court permitting him to sell or dispose of certain personal property set forth below, free and clear of liens at public or private sale without fur-

ther notice to creditors came before me in the Federal Courtroom, Tucson, Arizona, on the 11th day of September, 1953, at 2:30 p.m.

An objection to the granting of said petition was filed by the G. L. Curtis Company at that time, which objection also incorporated a petition of said G. L. Curtis Company praying that the court enter its order determining that said G. L. Curtis Company be declared the owner of said steel and that the Receiver have no right, interest or claim to it.

Whereupon sworn, testimony was taken from H. W. Murphy, President of the above bankrupt, representatives of the Allison Steel Manufacturing Company of Phoenix where said steel is stored, and M. E. Zetterholm of the Bank of Douglas, Tucson, Arizona, and the court found the following:

1. That the said G. L. Curtis Company advanced \$6,500.00 into a certain trust fund for which said M. E. Zetterholm, among others, acted as trustee and by the terms of said trust the monies contained therein were to be used in the operation of the bankrupt.

2. That said monies advanced by said G. L. Curtis Company were in the nature of a loan to be fully refunded to it from said trust by paying over to it the proceeds of certain contracts then being performed by the bankrupt.

3. That said \$6,500.00 was paid into said trust by check payable to M. E. Zetterholm and Ira L. Hart, trustees, and that G. L. Curtis Company there-

upon received from the bankrupt, as security for said advance, a bill of sale.

4. That the steel at the time of the giving of the security was the property of the bankrupt, and was stored to the account of the bankrupt.

5. That said bill of sale was given as a chattel mortgage and was unrecorded as of the time of the filing of the original petition herein.

6. That said chattel mortgage (bill of sale) is valid as between the parties appearing thereon but has no force and effect as against the Receiver in bankruptcy herein.

Wherefore the court being fully advised in the premises as to the law and the facts, having heard all the testimony of the witnesses and arguments of counsel, and both sides having rested their case;

It Is Ordered, Adjudged and Decreed that the Receiver be and hereby is authorized and permitted to sell or dispose of the following-described property located at the Allison Steel Manufacturing Company, 19th Avenue and Southern Pacific Tracks, Phoenix, Arizona, to wit:

193	pcs	5/16"	Plate	18"	x	72"	—weight	22,147	#
1	"		"	18"	x	56"		89	#
1	"		"	18"	x	48"		77	#
1	"		"	18"	x	24"		38	#

Total weight 22,351#

free and clear of liens at public or private sale without further notice to creditors and that said Allison Steel Manufacturing Company release the said steel to said Receiver or his order upon pay-

ment to said company of their charges as set forth in a letter to the receiver herein dated July 7, 1953; that the petition of the G. L. Curtis Company objecting to said sale and requesting that said G. L. Curtis Company be declared the owner of said steel is hereby denied, the title to said steel being vested in the Receiver herein free and clear of any claim or lien of said G. L. Curtis or G. L. Curtis Company.

Dated at Phoenix, Arizona, this 9th day of October, 1953.

STANLEY A. JERMAN,
Referee in Bankruptcy.

EXHIBIT B

In the United States District Court
for the District of Arizona

No. B-641, Tucson

In the Matter of:

ORACLE ENGINEERING AND SALES COR-
PORATION, an Arizona Corporation,

Debtor.

PETITION

Comes now G. L. Curtis Company, hereinafter referred to as the petitioner, and alleges:

I.

That heretofore, on the 6th day of March, 1952, Oracle Engineering and Sales Corporation was the owner of certain sheet steel manufactured by the

Allison Steel Manufacturing Company, Phoenix, Arizona, as follows:

8166 pounds—69 sheets—.312 4130 steel

2864 pounds—25 sheets—.312 4130 steel

7532 pounds—62 sheets—5/16" x 18" x 72" 4130 steel

4732 pounds—40 sheets—5/16" x 18" x 72" 4130 steel

That said steel was stored by Oracle Engineering and Sales Corporation, the bankrupts herein, with Allison Steel Manufacturing Company, Phoenix, Arizona;

II.

That on the 6th day of March, 1952, this petitioner purchased said steel from Oracle Engineering and Sales Corporation, the bankrupt herein, and paid therefor the sum of \$6,500.00;

III.

That upon payment of said money, said bankrupt executed and delivered to this petitioner a Bill of Sale in form and substance as shown by Exhibit A attached hereto and by reference made a part hereof;

IV.

That there is attached hereto and by reference made a part hereof a copy of the cancelled check issued by petitioner to Oracle Engineering and Sales Corporation in payment for said steel;

V.

That recently in these proceedings, Kenneth S. Hammes, the receiver herein, has laid some claim to the ownership of said steel and has represented to Allison Steel Manufacturing Company, Phoenix,

Arizona, that as receiver in bankruptcy in these proceedings he is entitled to the same;

VI.

That through inadvertence, Allison Steel Manufacturing Company, Phoenix, Arizona, has continued to carry said steel as being held for the account of Oracle Engineering and Sales Corporation since the 6th day of March, 1952, whereas in truth and in fact said steel has been stored with Allison Steel Manufacturing Company by this petitioner;

Wherefore, petitioner prays the court to enter its order determining that G. L. Curtis Company is the owner of the steel aforesaid and herein described and that the receiver, Kenneth S. Hammes, has no right, interest or claim of any kind or character to said steel.

G. L. CURTIS COMPANY,

By SCRUGGS AND RUCKER,

Attorneys for Petitioner.

Duly verified.

EXHIBIT A

Bill of Sale

Know All Men by These Presents:

That Oracle Engineering and Sales Corporation, an Arizona corporation, party of the first part, for and in consideration of the sum of Ten Dollars, lawful money of the United States of America, to it in hand paid by G. L. Curtis Company, the party of

the second part, and other good and valuable considerations, the receipt whereof is hereby acknowledged, does by these presents grant, bargain and sell and convey unto the said party of the second part, its successors and assigns, the following-described property located at the Allison Steel Manufacturing Company, Phoenix, Arizona:

8166 pounds—69 sheets—.312 4130 steel

2864 pounds—25 sheets—.312 4130 steel

7532 pounds—62 sheets—5/16" x 18" x 72" 4130 steel

4732 pounds—40 sheets—5/16" x 18" x 72" 4130 steel

To Have and to Hold the same to the party of the second part, its successors and assigns forever; and the said party of the first part does for its successors and assigns covenant and agree to and with the said party of the second part, its successors and assigns, to warrant and defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, its successors and assigns, against all and every person or persons whomsoever lawfully claiming or to claim the same.

In Witness Whereof, Oracle Engineering and Sales Corporation, a corporation, has caused these presents to be executed and its corporate seal to be hereunto affixed, all on this 6th day of March, 1952.

[Seal] ORACLE ENGINEERING AND SALES
CORPORATION,

By H. W. MURPHY,
President.

Attest:

ORAN SARRELS,
Secretary.

State of Arizona,
County of Pima—ss.

This instrument was acknowledged before me this 6th day of March, 1952, by H. W. Murphy, as President, and by Oran Sarrels, as Secretary, respectively, of Oracle Engineering and Sales Corporation, a corporation.

[Seal] HELEN E. MERKLEY,
Notary Public, Pima County,
Arizona.

My commission expires Jan. 7, 1955.

State of Arizona,
County of Pima—ss.

I, H. W. Murphy, President of Oracle Engineering and Sales Corporation, a corporation, declare on oath that the within-named Oracle Engineering and Sales Corporation, a corporation, is the sole owner of the chattels set out in the within and foregoing Bill of Sale, and that said chattels are clear, free and unencumbered.

Witness my hand this 6th day of March, 1952.

H. W. MURPHY.

Attest:

ORAN SARRELS,
Secretary.

Subscribed and sworn to before this day of
March, 1952.

[Seal] HELEN E. MERKLEY,
Notary Public, Pima County,
Arizona.

My Commission Expires Jan. 7, 1955.

EXHIBIT B

91-179
1121

No. 4

Tucson, Arizona, March 6, 1952

Pay to

the order of H. E. Zetterholm and Ira L. Hart,
Trustees\$6,500.00

Sixty Five Hundred & 00/100.....Dollars

G. L. CURTIS COMPANY,

By G. L. CURTIS,
President.

To

The Bank of Douglas,
Tucson, Arizona.

Reverse

M. E. Zetterholm

Paid

Ira L. Hart

3-7-52

Trustees

91-179

EXHIBIT C

United States District Court
for the District of Arizona

B-641, Tucson

In the Matter of:

ORACLE ENGINEERING AND SALES CORPORATION, an Arizona Corporation,

Bankrupt.

RECEIVER'S PETITION TO SELL
PERSONAL PROPERTY

Comes now Kenneth S. Hammes duly appointed Receiver in the above-named matter and respectfully petitions the court as follows:

That there presently is stored to the account of the above-named bankrupt at the Allison Steel Manufacturing Company, 19th Avenue and Southern Pacific Tracks, Phoenix, Arizona, the following-described personal property:

193 pcs	5/16"	Plate	18" x 72"	—weight	22,147 #
1 "	"	"	18" x 56"		89 #
1 "	"	"	18" x 48"		77 #
1 "	"	"	18" x 24"		38 #

Total weight 22,351 #

That said personal property was stored on said premises on or about the 9th day of August, 1952; that the above set forth personal property was paid for by the above-named bankrupt; that title to same

was taken in its name; that your Receiver has received a letter from the Allison Steel Manufacturing Company in answer to his inquiry pertaining to this matter, a copy of which is attached hereto and by reference made a part hereof. That a reading of said letter discloses certain values that may be placed upon said steel.

Wherefore your petitioner prays for an order of this court permitting him to sell or dispose of the above set forth personal property free and clear of liens at public or private sale without further notice to creditors and that said Allison Steel Manufacturing Company release the said property which they are holding as per their attached letter upon payment to them of their likewise set forth charges and for such other and further relief as the court may deem just.

/s/ KENNETH S. HAMMES,

KENNETH S. HAMMES,

Receiver and Petitioner.

Duly verified.

Allison Steel Manufacturing Company
 19th Avenue and Southern Pacific Tracks
 P.O. Box 6067, Alpine 8-7731
 Phoenix, Arizona

July 7, 1953.

Kenneth S. Hammes, Receiver,
 On Behalf of the Federal Court,
 Oracle Engineering & Sales Corporation,
 P.O. Box 5071,
 Tucson, Arizona.

Re: Oracle Engineering & Sales Corp.
 Case No. B-641, Tucson.

Dear Mr. Hammes:

In reply to your letter of June 30 regarding the steel plates we have stored in our yard, we give you the following information:

1. Stored for the account of Oracle Engineering & Sales.
2. Stored August 9, 1952.
- 3.

193 pcs	5/16"	Plate	18" x 72"	—weight	22,147#
1 "	"	"	18" x 56"		89#
1 "	"	"	18" x 48"		77#
1 "	"	"	18" x 24"		38#

Total weight 22,351#

4. Handling charges, etc., \$117.00. Interest from August 9, 1952, to July 9, 1953, \$8.58. Storage charges from August 9, 1952, to July 9, 1953, \$55.00.

5. Value to us, \$25.00 per ton as scrap. However, if the heat test reports and chemical analyses of this plate were available and the alloy content known, they might be sold at approximately their original value.
6. They are in good condition. 35 sheets are wrapped and approximately 90% are oiled.
7. They are stored under an open shed adjoining our warehouse.

Yours very truly,

ALLISON STEEL MFG.
COMPANY,

By PILLY S. MOYER,
Credit Manager.

PSM:s

EXHIBIT D

In the United States District Court
for the District of Arizona

No. B-641, Tucson

In the Matter of:

ORACLE ENGINEERING AND SALES COR-
PORATION, an Arizona Corporation,
Debtor.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW PROPOSED BY G. L. CURTIS COM-
PANY ON PETITION OF THE RECEIVER
FOR AUTHORITY TO SELL CERTAIN
PERSONAL PROPERTY, OBJECTIONS
TO SUCH PETITION BY G. L. CURTIS
COMPANY AND PETITION OF G. L.
CURTIS COMPANY FOR ORDER DE-
CLARING G. L. CURTIS COMPANY TO BE
THE OWNER OF CERTAIN PERSONAL
PROPERTY

This matter having come on regularly for hearing at Tucson on the 11th day of September, 1953, for hearing on the petition of G. L. Curtis Company, the petition of the Receiver to sell Personal Property and Objection to Receiver's Petition to Sell Property; the Receiver being present in person and by his counsel, C. R. McFall and Warren H. Lynch, the Bank of Douglas being present by M. E. Zetterholm and his counsel, A. Y. Holesapple, the

bankrupt being present by its counsel, William K. Richey, and G. L. Curtis Company being present by its counsel, Edward W. Scruggs of Scruggs and Rucker, and evidence, oral and documentary, having been introduced in evidence, the Court having duly considered the same, does now find:

I.

That on the 6th day of March, 1952, G. L. Curtis Company executed and delivered to Oracle Engineering and Sales Corporation its check numbered 4 in the sum of \$6,500.00, payable to H. E. Zetterholm and Ira L. Hart, Trustees, Exhibit No. 1;

II.

That in exchange for the check of G. L. Curtis Company, said Exhibit No. 1, Oracle Engineering and Sales Corporation executed its Bill of Sale to G. L. Curtis Company, Exhibit No. 3, on the 6th day of March, 1952, for the following items of personal property:

8166 pounds—69 sheets—.312 4130 steel
2864 pounds—25 sheets—.312 4130 steel
7532 pounds—62 sheets—5/16" x 18" x 72" 4130 steel
4732 pounds—40 sheets—5/16" x 18" x 72" 4130 steel

III.

That the Bill of Sale executed by Oracle Engineering and Sales Corpoartion to G. L. Curtis Company was not recorded in the office of the County Recorder of Pima County, Arizona;

IV.

That on the said 6th day of March, 1952, the personal property described in the Bill of Sale exe-

cuted by Oracle Engineering and Sales Corporation was in the possession of Allison Steel Manufacturing Company in Phoenix, Arizona;

V.

That on the 14th day of March, 1952, Oracle Engineering and Sales Corporation notified Allison Steel Manufacturing Company that the property described in the Bill of Sale executed by Oracle Engineering and Sales Corporation on the 6th day of March, 1952, Exhibit No. 3, was the property of G. L. Curtis, by letter, Exhibit No. 4 herein;

VI.

That on the 20th day of March, 1952, Allison Steel Manufacturing Company acknowledged to Oracle Engineering and Sales Corporation that it recognized the property described in Bill of Sale executed on the 6th day of March, 1952, Exhibit No. 3, as the property of G. L. Curtis;

VII.

That the value of the steel described in the Bill of Sale executed by Oracle Engineering and Sales Corporation, Exhibit No. 3, is not in excess of \$25.00 per ton as scrap;

VIII.

That there is no ready market for the steel because of its alloy content;

IX.

That said steel would have a market other than that of scrap only in the event a person having a particular type of contract had use for the same;

and that such a person is not apparently available to purchase said steel;

X.

That M. E. Zetterholm and Ira L. Hart as Trustees who received the check drawn by G. L. Curtis Company, Exhibit No. 1, and delivered in exchange for the Bill of Sale executed by Oracle Engineering and Sales Corporation, Exhibit No. 3, received said money and used the same on behalf of Oracle Engineering and Sales Corporation in a revolving fund in the sum of \$30,000.00 theretofore paid into said fund by G. L. Curtis and which \$30,000.00 was considered as a loan secured by assignments of certain accounts of Oracle Engineering and Sales Corporation and was administered by said Trustees for the use and benefit of Oracle Engineering and Sales Corporation and was in addition to the \$30,000.00 theretofore paid into said fund and secured by said assignment;

XI.

That H. W. Murphy as president of Oracle Engineering and Sales Corporation, in the name of Oracle Engineering and Sales Corporation made several attempts to sell the steel described in said Bill of Sale, Exhibit No. 3, for the account of G. L. Curtis Company after the execution of said Bill of Sale;

Conclusions of Law

I.

The Bill of Sale executed by Oracle Engineering and Sales Corporation, Exhibit No. 3, to G. L. Curtis

Company constituted a sale of the steel described in said Exhibit No. 3 to G. L. Curtis Company;

II.

The Bill of Sale executed by Oracle Engineering and Sales Corporation to G. L. Curtis Company, Exhibit No. 3, constituted a transfer of the property of Oracle Engineering and Sales Corporation in exchange for a present fair consideration as defined by the Bankruptcy Act;

III.

The transfer of the property of Oracle Engineering and Sales Corporation to G. L. Curtis Company did not constitute a preference under the provisions of the Bankruptcy Act;

Alternative Additional Findings of Fact and Conclusions of Law

Without admitting the correctness thereof, but insisting that it is an erroneous finding, contrary to the evidence, in the event the Court makes the following finding or one of like import:

“The Bill of Sale executed by Oracle Engineering and Sales Corporation, Exhibit No. 3, to G. L. Curtis Company, was executed as security for the repayment to G. L. Curtis Company of the sum of \$6,500.00 represented by Exhibit No. 1 paid into the revolving fund.”

then the petitioner, G. L. Curtis Company, proposes the following Conclusions of Law:

I.

The Bill of Sale executed by Oracle Engineering and Sales Corporation to G. L. Curtis Company, Exhibit No. 3, constituted a transfer of the property of Oracle Engineering and Sales Corporation in exchange for a present fair consideration as defined by the Bankruptcy Act.

II.

The notice to Allison Steel Manufacturing Company executed by Oracle Engineering and Sales Corporation, Exhibit No. 4, that the steel was the property of G. L. Curtis Company and the acceptance thereof by Allison Steel Manufacturing Company, Exhibits Nos. 5 and 6, constituted a change of possession within the terms of Section 62-502, Arizona Code Annotated, 1939.

III.

The execution of the Bill of Sale, Exhibit No. 3, and the change of possession of the steel described therein constituted a pledge for the repayment to G. L. Curtis Company of the sum of \$6,500.00 paid by it to M. E. Zetterholm and Ira L. Hart, Trustees, Exhibit No. 1.

IV.

By the provisions of Section 62-523, ACA, 1939, the Bill of Sale being accompanied by change of possession, although intended to operate as a lien upon personal property instead of a transfer of ownership, was not required to be recorded to be valid against third persons or creditors of Oracle Engineering and Sales Corporation, and is not

fraudulent or voidable by any creditor of the bankrupt, or by the Receiver herein pursuant to the provisions of the Bankruptcy Act.

V.

G. L. Curtis Company is entitled to the possession of the steel described in Bill of Sale, Exhibit No. 3, until it is paid the sum of \$6,500.00 by Oracle Engineering and Sales Corporation, or the Receiver herein.

Respectfully submitted,

SCRUGGS AND RUCKER,

Attorneys for G. L. Curtis and

G. L. Curtis Company.

By E. F. RUCKER.

EXHIBIT E

In the United States District Court
for the District of Arizona

No. B-641, Tucson

In the Matter of:

ORACLE ENGINEERING AND SALES CORPORATION, an Arizona Corporation,

Bankrupt.

OBJECTION TO RECEIVER'S
PETITION TO SELL PROPERTY

Comes now G. L. Curtis Company and files its objection to the Receiver's Petition to Sell Personal Property herein;

The petition of G. L. Curtis Company, heretofore filed herein on or about the 17th day of August, 1953, is by reference made a part hereof, and your petitioner prays the Court that the petition of the Receiver to sell said personal property be denied for the reason that the Receiver has no right, interest or claim of any kind or character to said personal property.

SCRUGGS AND RUCKER,

By E. F. RUCKER,

Attorneys for G. L. Curtis
Company.

EXHIBIT F

In the District Court of the United States
in and for the District of Arizona

No. B-641, Tucson

In the Matter of:

ORACLE ENGINEERING AND SALES CORPORATION, an Arizona Corporation,

Bankrupt.

OBJECTIONS OF G. L. CURTIS COMPANY
TO FINDINGS AND ORDER PROPOSED
BY RECEIVER

Comes now G. L. Curtis Company and objects to Finding of Fact No. 5, proposed by the Receiver herein on the Receiver's Petition to Sell Personal

Property on the ground and for the reason that the Bill of Sale given by Oracle Engineering and Sales Corporation to G. L. Curtis Company was a sale of the property for which a present fair consideration was given and the finding proposed is contrary to the evidence.

Comes now G. L. Curtis Company and in the alternative, in the event the Court enters the said proposed Finding of Fact No. 5, objects to the Finding of Fact numbered 6 which is a Conclusion of Law proposed by the Receiver herein on the ground and for the reason that the same is an incorrect statement of the law as set forth in sections 62-502 and 62-523, ACA, 1939, wherein it is stated in effect that when a change of possession occurs, a chattel mortgage need not be recorded.

Without waiving the foregoing objections, G. L. Curtis Company further objects to the Findings of Fact and Conclusions of Law proposed by the Receiver on the Petition to Sell Personal Property on the ground and for the reason that they fail to correctly state the evidence and the law applicable thereto.

Respectfully submitted,

SCRUGGS AND RUCKER,

By E. F. RUCKER,

Attorneys for G. L. Curtis
Company.

Receipt of copy acknowledged.

[Endorsed]: Filed October 26, 1953.

In the District Court of the United States
in and for the District of Arizona

B-641, Tucson

In the Matter of:

ORACLE ENGINEERING AND SALES COR-
PORATION, an Arizona Corporation,

Bankrupt.

OBJECTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW PROPOSED BY
G. L. CURTIS COMPANY OF PETITION
OF RECEIVER FOR AUTHORITY TO
SELL CERTAIN PERSONAL PROPERTY,
ETC.

Comes now Kenneth S. Hammes receiver herein and objects to the Findings of Fact and Conclusions of Law proposed by G. L. Curtis Company filed herein on the general grounds that they are incomplete, contrary to the evidence set forth at the hearing had in this matter, and that they incorrectly state the law pertaining to the evidence taken.

More specifically, the receiver objects to findings Nos. VIII and IX as being immaterial and incorrect and to finding No. X in that it is an incomplete statement of the evidence.

Objects to conclusions of law Nos. I and II as being contrary to the evidence and in the light of such objections to No. III as being immaterial.

Objects to finding No. I under G. L. Curtis Company's alternative additional findings of fact and conclusions of law in that it is an incorrect statement of the law and evidence and to finding No. II in that it is an incorrect statement of the law. (See receiver's reply to G. L. Curtis Company's objections to receiver's findings filed herein.)

Objects to finding No. IV as incomplete, incorrect and an improper statement of the law and the evidence herein and objects to finding No. V in that it is improper according to the law and the evidence in that the position of G. L. Curtis Company can be no better than that of any other unsecured creditor.

/s/ WARREN H. LYNCH,
Attorney for Kenneth S. Hammes, Receiver in
Bankruptcy.

Affidavit of mail attached.

[Endorsed]: Filed September 18, 1953.

In the District Court of the United States
in and for the District of Arizona
No. B-641, Tucson

In the Matter of:

ORACLE ENGINEERING AND SALES COR-
PORATION, an Arizona Corporation,

Bankrupt.

REPLY TO G. L. CURTIS COMPANY'S OB-
JECTIONS TO RECEIVER'S FINDINGS
AND ORDER

Comes now Kenneth S. Hammes, receiver, and in reply to the objections of the G. L. Curtis Company to the Findings and Order proposed by said receiver filed herein sets forth the following:

Objection is taken by said G. L. Curtis Company to receiver's finding No. 5 on the grounds that it is contrary to the evidence. This finding is correct and the evidence can in no way be tortured into disclosing an outright sale. Prior to the date of the transaction G. L. Curtis told Mr. M. E. Zetterholm, trustee, that he needed additional security from the bankrupt if he was to advance another \$6,500.00 into the trust for the benefit of said bankrupt. He advanced said money into the trust, the conditions of which were that all monies advanced by him were to be returned to him, and took a chattel mortgage in the form of a bill of sale. This cannot be construed as anything better than a secured loan. On numerous occasions prior to this Curtis loaned money to the bankrupt in exactly the same manner,

taking a bill of sale as security in lieu of a chattel mortgage. G. L. Curtis Company filed a petition herein requesting that the said other bills of sale be declared mortgages, which the court granted and said Curtis Company cannot be heard to say that this one was a valid bill of sale merely because it overlooked recording same, with all the evidence entirely to the contrary. The one exception is a letter written by the bankrupt's president to the Allison Steel Manufacturing Company of Phoenix, stating that G. L. Curtis (said president's father-in-law) had purchased the steel, which said letter was promptly buried in the files of said company, who, knowing the relationship, did not even, according to their testimony, bother to change the storage account out of the name of the bankrupt.

G. L. Curtis Company further objects to the receiver's finding No. 6, which states in effect that said bill of sale as an unrecorded chattel mortgage has no force and effect as against the receiver, on the grounds that it is an incorrect statement of the law as set forth in Sections 62-502 and 62-523, A.C.A., 1939. It is obvious that when the court ruled in open court that the receiver has valid title to said steel set forth in said chattel mortgage, that said receiver may sell same and that any claims of G. L. Curtis Company to it be denied, that he had considered the point raised here although said point, as stated in its letter, was overlooked by said Curtis Company.

The above-cited section in fact states the following:

Section 62-502: "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except of personal property when accompanied by an actual change of possession, which is to be deemed a pledge." (Emphasis added.)

Section 62-523: "A chattel mortgage or other instrument of writing intended to operate as a mortgage or lien upon personal property, which is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, is void as against the creditors of the mortgagor. * * *" (Emphasis added.)

The purpose of these statutes is to give either actual or constructive notice to creditors. It cannot possibly be said here that there was an immediate delivery followed by actual and continued change of possession of the property mortgaged.

The steel was admittedly owned and stored by the bankrupt with the Allison Steel Manufacturing Company of Phoenix. After the date of the chattel mortgage the steel company continued to carry the steel as stored for the account of the bankrupt and still continues same. The president of the bankrupt sent letters and telegrams stating that the bankrupt had the steel to sell or dispose of and nationally advertised the steel for sale in the name of the bankrupt.

In a letter to the receiver herein dated June 7, 1953, approximately three months ago, said steel company stated it was storing the steel for the account of the bankrupt.

There is no question that in the eyes of the creditors, the receiver and the whole community, the steel belonged to the bankrupt and was in the bankrupt's possession and control, and this impression was unquestionably consented to by said G. L. Curtis Company, it being the proper one.

The receiver is vested, as to all property in the possession or control of the bankrupt at the date of bankruptcy, with the rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and as to all other property, the receiver is deemed vested with the rights, remedies and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists. (See Collier's Bankruptcy Manual, Section 70.01, page 897.)

It is apparent from the above that the objections of G. L. Curtis Company to the Findings and Order proposed by the receiver herein should be denied.

/s/ WARREN H. LYNCH,
Attorney for Kenneth S. Hammes, Receiver in
Bankruptcy.

Affidavit of mail attached.

[Endorsed]: Filed September 18, 1953.

In the United States District Court
for the District of Arizona

No. B-641, Tucson

In the Matter of:

ORACLE ENGINEERING AND SALES COR-
PORATION, an Arizona Corporation,

Bankrupt.

REFEREE'S STATEMENT
OF EVIDENCE

Be it remembered that at the hearing of the Receiver's Petition to Sell Personal Property and the Objections thereto filed by G. L. Curtis Company, and the Petition of G. L. Curtis Company for an Order declaring said G. L. Curtis Company to be the owner of said personal property, held on the 11th day of September, 1953, the following witnesses were sworn and examined and testified in substance as follows:

H. W. Murphy, being first duly sworn, testified that he was president of Oracle Engineering and Sales Corporation on March 6, 1952; that on said day of March 6, 1952, G. L. Curtis Company disbursed for the use of Oracle Engineering and Sales Corporation the sum of \$6,500.00 by delivering its check in said sum to M. E. Zetterholm and Ira L. Hart, as Trustees (Exhibit No. 1 in evidence); that Oracle Engineering and Sales Corporation thereupon delivered to G. L. Curtis Company in consid-

eration of such disbursement an instrument entitled Bill of Sale (Exhibit No. 3 in evidence) wherein was described the steel here in question; that said steel was at that time in the possession of Allison Steel Manufacturing Company in Phoenix, Arizona; that on March 14, 1952, Oracle Engineering and Sales Corporation sent to Allison Steel Manufacturing Company a letter (Exhibit No. 4 in evidence) notifying it of said transaction; that said instrument entitled "Bill of Sale," was not filed or recorded in any county recorder's office; that on several previous occasions when G. L. Curtis Company had loaned money to Oracle Engineering and Sales Corporation it had taken as security therefor instruments similar in form to Exhibit No. 3 in evidence, said instruments having been regarded as chattel mortgages to secure said Loans and having been treated as null and void upon payment of said respective loans; that in one of said transactions a "Bill of Sale" covering the same steel herein involved was given as security and was regarded as a chattel mortgage and treated as of no effect upon repayment of the loan thereby secured; that the transaction herein involved was substantially the same as other previous transactions wherein instruments entitled Bills of Sale were given as security with the effect of chattel mortgages.

Polly S. Moyer, being first duly sworn, testified that on March 6, 1952, she was credit manager for Allison Steel Manufacturing Company; that Allison Steel Manufacturing Company received the instru-

ment marked in evidence as Exhibit No. 4; that Allison Steel Manufacturing Company acknowledged receipt of said notice in a letter directed to Oracle Engineering and Sales Corporation, a copy of which was in Allison Steel Manufacturing Company's files and marked Exhibit No. 5 in evidence herein; that at the time said notice was received the steel was on the books of Allison Steel Manufacturing Company on an account in the name of Oracle Engineering and Sales Corporation, and the name of the account was not changed but the steel remained in the possession of Allison Steel Manufacturing Company and is now in the possession of Allison Steel Manufacturing Company; that subsequent to the day of receipt of Exhibit No. 4 in evidence no service was performed and nothing was done in connection with the steel on behalf of Oracle Engineering and Sales Corporation; that Allison Steel Manufacturing Company has a claim for handling charges and storage on said steel in the amount of \$185.58.

John W. Morgan, being first duly sworn, testified that on March 6, 1952, he was sales manager for Allison Steel Manufacturing Company; that prior thereto Allison Steel Manufacturing Company had received from Oracle Engineering and Sales Corporation possession of the steel herein involved; that said steel was received from Oracle Engineering and Sales Corporation or its agents for fabrication; that said fabricating was not accomplished by reason of failure of dies furnished to Allison Steel

Manufacturing Company and inability of presses to perform the work; that the value of the steel is only that of scrap and that its scrap value is \$25.00 per ton; that in the event a special need for this particular steel which is of a high alloy could be found its value might be somewhat greater than that of scrap; that the steel is for a special and specific use and not in general demand; and that said steel is still in the possession of Allison Steel Manufacturing Company.

M. E. Zetterholm, being first duly sworn, testified that he is an officer of The Bank of Douglas and that on March 6, 1952, he was an officer of said bank; that prior thereto G. L. Curtis Company had established a trust account at The Bank of Douglas called a revolving fund controlled by the witness and by Ira L. Hart, as Trustees, for the use of Oracle Engineering and Sales Corporation, the amounts deposited therein to be repaid by said Oracle Engineering and Sales Corporation, such repayment being secured by assignments of certain accounts of Oracle Engineering and Sales Corporation; that on the said March 6, 1952, he received as one of the Trustees of said revolving fund the check drawn by G. L. Curtis Company in the sum of \$6,500.00 and introduced in evidence herein as Exhibit No. 1; that the proceeds of said check were deposited in said revolving fund account; that he was not present at the negotiations between Oracle Engineering and Sales Corporation and G. L. Curtis Company for the advance of the said funds and the

execution and delivery of the instrument introduced in evidence as Exhibit No. 3; that he had a conversation with G. L. Curtis at about the time of the depositing of the check (Exhibit No. 1) with him in which G. L. Curtis was discussing the means of securing the repayment of any additional money which might be advanced into the revolving fund and G. L. Curtis asked the witness if he could secure such repayment by obtaining a Bill of Sale to certain steel which was owned by Oracle Engineering and Sales Corporation as security for money to be advanced in the revolving fund and was advised to see his lawyer; that the witness deposited the said sum of \$6,500.00 into the said revolving fund; that the duties of the witness and the said Ira L. Hart in relation to funds deposited in said revolving account by G. L. Curtis Company were prescribed by a letter dated February 4, 1952, from G. L. Curtis Company to the witness and the said Ira L. Hart, a copy of which is part of the record in this case.

I certify that the foregoing is a true and complete statement of substantially all of the testimony introduced before me at a hearing at Tucson, Arizona, on the 11th day of September, 1953, in the matter of Oracle Engineering and Sales Corporation, an Arizona corporation, Bankrupt, on Receiver's Petition to Sell Personal Property and the Objections of G. L. Curtis Company thereto and the Petition of G. L. Curtis Company for an Order declaring G. L. Curtis Company to be the owner of

certain steel described in said Petition; and that in addition to said testimony and the documents offered in evidence at said hearing I considered two documents which had theretofore been made a part of the record in this matter, to wit: (1) the letter from G. L. Curtis Company to The Bank of Douglas, dated February 4, 1952, concerning which M. E. Zetterholm testified, and (2) a letter dated July 7, 1953, from Allison Steel Manufacturing Company to Kenneth S. Hammes, concerning the steel here in question, a copy of which is attached to the said Receiver's Petition to Sell Personal Property. Copies of both of said letters are hereto attached as Exhibits "A" and "B," respectively.

Dated at Phoenix, Arizona, this 15th day of March, 1953.

/s/ STANLEY A. JERMAN,
Referee in Bankruptcy.

[Endorsed]: Filed March 9, 1954.

CREDITOR'S EXHIBIT No. 2

(Copy)

March 14, 1952.

Allison Steel Manufacturing Co.,
P.O. Box 6067,
Phoenix, Arizona.

Dear Sirs:

On March 6, 1952, the steel listed below, which you have in your possession, was sold to Mr. G. L. Curtis by this corporation:

8166 pounds—69 sheets—.312 4130 steel
2864 pounds—25 sheets—.312 4130 steel
7532 pounds—62 sheets—5/16" x 18" x 72" 4130 steel
4732 pounds—40 sheets—5/16" x 18" x 72" 4130 steel

This steel is the property of Mr. G. L. Curtis.

Yours very truly,

ORACLE ENGINEERING &
SALES CORPORATION,

H. W. MURPHY,
President.

HWM:lc

[Cancelled check—See Exhibit B attached to Petition of G. L. Curtis Co., etc.]

Received in evidence September 11, 1953.

CREDITOR'S EXHIBIT No. 5

March 20, 1952.

Oracle Engineering & Sales Corporation,
Tucson, Arizona.

Attention: Mr. Howard Stevens.

Refer: Your Purchase Order 577,
Reference File No. A-94-27,
Our Job No. Y-3829,
Bomb Sling Yokes.

Gentlemen:

We wish to acknowledge your letter of March 5 requesting cancellation charge on the above order if the Air Force should cancel your contract. We wish to advise that the amount due on this order as of March 12 is \$83.75. This amount covers the setup charge of dies and labor expended in making sample parts, also handling of material.

Your letter of March 14 by Mr. Murphy advised that the material shipped to us to be used on the above job has been sold to Mr. G. L. Curtis. We assume from this information that your contract with the Air Force has been cancelled. Please advise us if it is in order for us to forward you our invoice in the amount of \$83.75 as a final billing on this job.

Very truly yours,

ALLISON STEEL MANUFACTURING COMPANY,

By JOHN W. MORGAN.

P.S.:

Please advise what disposition you want us to make of the forming dies which you furnished to us on this job.

cc: Harry Stafford,
Dorothy Richter,
Polly Moyer.

Received in evidence September 11, 1953.

CREDITOR'S EXHIBIT No. 6

April 22, 1952.

Oracle Engineering & Sales Corporation,
Tucson, Arizona.

Attention: Mr. Howard Stevens.

Refer: Your P.O. No. 577,
Reference File No. A-94-27,
Our Job No. Y-3829 Bomb Sling Yokes.

Gentlemen:

Since there has been no new development regarding the above job, we assume that you will wish to close this job out. Please advise us if we should forward to you our final billing on this job at this time.

We also note that the plate which you sold to Mr.

G. L. Curtis has not yet been picked up. Please advise on this matter also.

Very truly yours,

ALLISON STEEL MANUFACTURING COMPANY,

By JOHN W. MORGAN.

Received in evidence April 22, 1952.

PETITIONER'S EXHIBIT No. 5

Tucson, Arizona,
February 4, 1952.

Mr. M. E. Zetterholm and
Mr. Ira L. Hart, as Trustees,
c/o The Bank of Douglas,
902 North Stone Avenue,
Tucson, Arizona.

Gentlemen:

I herewith deliver to you my check in the sum of \$13,500.00 payable to your order as trustees. You are instructed to deposit the proceeds of this check to your account as trustees in The Bank of Douglas, 902 North Stone Avenue, Tucson, Arizona. In consideration of your accepting this letter and assuming the duties of trustees hereunder, I do hereby agree to advance to you as such trustees, amounts in the total aggregate sum of \$30,000.00 as requested by you, the above-mentioned amount being included in said aggregate sum. The check dated February 1,

1952, signed by me, in the sum of \$1,500.00 payable to the order of The Bank of Douglas, in trust, likewise is included in said aggregate sum.

The checks that are signed from time to time on this trust account in The Bank of Douglas shall bear the signatures of any two of the following parties: F. C. Brophy, M. E. Zetterholm, Ira L. Hart, or any nominee of F. C. Brophy.

I hereby instruct you to deposit in said trust account any and all such funds as may be paid to The Bank of Douglas, as assignees, under the following Air Force contract and other Purchase Orders; and such additional Purchase Orders as may hereafter be acquired during the term of this instrument.

Date	Account Name	Number	Amount
a. 22, 1925	Goodyear Aircraft Corporation	15,212-A	\$17,724.00
a. 22, 1925	Goodyear Aircraft Corporation	15,210-A	18,001.20
y. 14, 1951	Goodyear Aircraft Corporation	10,870	28,730.00
y. 14, 1951	Goodyear Aircraft Corporation	10,871	28,730.00
y. 14, 1951	Goodyear Aircraft Corporation	10,872	14,365.00
y. 14, 1951	Goodyear Aircraft Corporation	10,873	14,365.00
y. 14, 1951	Goodyear Aircraft Corporation	10,874	14,365.00
y. 14, 1951	Goodyear Aircraft Corporation	10,875	12,641.20
a. 18, 1952	J. N. Fauver Co., Inc.	OM 10758	24,474.77
y. 23, 1951	J. N. Fauver Co., Inc.	OM 10220	3,736.50
ne 15, 1951	Air Materiel Command, Wright-Patterson Air Force Base	AF 33(038)-28495	12,048.96
y. 29, 1951	Aero Design & Engineering Co.	5114	1,840.00
a. 5, 1952	Goodyear Aircraft Corporation	15,183	143.60
a. 5, 1952	Goodyear Aircraft Corporation	15,184	176.40
a. 5, 1952	Goodyear Aircraft Corporation	15,185	775.80
a. 9, 1952	Goodyear Aircraft Corporation	15,157	1,309.80
a. 22, 1952	Goodyear Aircraft Corporation	15,197-A	1,504.50
e. 11, 1951	General Motors Corporation	KDS 12858	524.43

You are hereby authorized, in your discretion, or in the discretion of either of you and F. C. Brophy or his nominee, to transfer funds of said trust account from time to time into the checking account of Oracle Engineering and Sales Corporation, it being understood that the funds thus transferred to the Oracle Engineering and Sales Corporation are for the purpose of paying or covering checks issued by said Oracle Engineering and Sales Corporation.

The instructions hereby given to you shall be irrevocable up to and including the 1st day of May, 1952, unless you receive instructions from me extending the above termination date; then upon that date or the extended date as the case may be, you are forthwith to issue your check in the total balance of the amount of said trust account at that time to my order so as to transfer the balance of such funds to me. But the amount of funds transferred to me shall in no event exceed the net aggregate amount advanced by me hereunder; and as to any funds then in excess of these funds advanced by me they shall be transferred by you to said Oracle Engineering and Sales Corporation, whereupon you and each of you, including Mr. F. C. Brophy and/or any nominee or nominees that he may have appointed hereunder, shall be forthwith fully and completely discharged from any liability in connection herewith.

You are to keep an accounting of all of your receipts and disbursements hereunder and are to provide me with a monthly summary of such ac-

counting or such other accountings whenever requested by me.

It is expressly understood by me that your responsibility hereunder, as well as that of Mr. Brophy and/ or any nominee or nominees appointed by him, shall be to use reasonable care and ordinary diligence to carry out the intent of this letter.

Very truly yours,

/s/ G. L. CURTIS.

All of the provisions of the foregoing letter of instructions are hereby approved this 6th day of February, 1952.

ORACLE ENGINEERING AND
SALES CORP.,

By /s/ H. W. MURPHY,
President.

The foregoing letter of instructions received and accepted by us this 6th day of February, 1952.

/s/ M. E. ZETTERHOLM,

/s/ IRA L. HART.

This letter of instruction has been executed in quintuplicate.

Filed April 24, 1953.

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE OF REVIEW

To the Honorable Judges of the District Court:

I, Stanley A. Jerman, the Referee in Bankruptcy for this District, do hereby certify as follows:

In the course of this proceeding I made and entered on October 9, 1953, an order entitled "Findings and Order" by which I authorized the receiver herein to sell certain personal property herein described and found that neither G. L. Curtis nor G. L. Curtis Company owned or had any interest in or to said personal property.

On October 26, 1953, G. L. Curtis Company, a corporation, an adverse claimant to the property concerned in the above-mentioned order, filed herein its petition for review of said order.

The errors complained of by the said petitioner are set forth in full in its petition.

The questions presented for review are:

1. Whether the transaction concerned was a sale of the property by the bankrupt to G. L. Curtis Company or was a mortgage of said property to secure a debt; and

2. Regardless of whether it was a sale or mortgage whether there was such a change of possession as to give G. L. Curtis Company any interest in said property as against receiver herein.

The following papers are herewith submitted:

1. Petition of G. L. Curtis Company for Review of Order entered by the Referee on the 9th day of October, 1953, Granting Petition of the Receiver to sell personal property.
2. Receiver's Petition to Sell Property, filed September 9, 1953.
3. Objections to Receiver's Petition to Sell Property, filed September 14, 1953.
4. Findings of Fact and Conclusions of Law Proposed by G. L. Curtis Company on Petition of Receiver for Authority to Sell Certain Personal Property, Objections to such Petition by G. L. Curtis Company, and Petition of G. L. Curtis Company for Order Declaring G. L. Curtis Company to Be the Owner of Certain Personal Property, filed September 21, 1953.
5. Objections to Findings of Fact and Conclusions of Law Proposed by G. L. Curtis Company, filed September 18, 1953.
6. Objections of G. L. Curtis Company to Findings and Order Proposed by Receiver, filed September 21, 1953.
7. Reply to G. L. Curtis Company's Objections to Receiver's Findings and Order, filed September 18, 1953.
8. Findings and Order, filed October 14, 1953.
9. Referee's Statement of Evidence.

10. All exhibits filed at the hearing.

11. Letter from G. L. Curtis Company to The Bank of Douglas, dated February 4, 1952.

Dated: May 26th, 1954.

Respectfully submitted,

/s/ STANLEY A. JERMAN,
Referee in Bankruptcy.

[Endorsed]: Filed May 26, 1954.

[Title of District Court and Cause.]

MINUTE ENTRY OF—MONDAY, JUNE 7, 1954

This case comes on for setting of Referee's Certificate on Petition for Review of G. L. Curtis Company for hearing. No appearance is had by or on behalf of the bankrupt. Edgar Rucker, Esquire, is present on behalf of the reviewing creditor. Richard Fish, Esquire, appears for Reed Carlock, Esquire, attorney for the trustee, and

It Is Ordered that Referee's Certificate of Review is set for hearing on Monday, June 14, 1954, at 2 o'clock p.m.

[Title of District Court and Cause.]

MINUTE ENTRY OF—MONDAY, JUNE 14, 1954

The Referee's Certificate on Petition for Review of G. L. Curtis Company comes on regularly for hearing this day. Edward W. Scruggs, Esquire, is present on behalf of the reviewing creditor. Reed Carlock, Esquire, appears on behalf of the trustee.

Hearing is now had on the Referee's Certificate of Review, and

It Is Ordered that said matter be submitted and by the Court taken under advisement.

[Title of District Court and Cause.]

MINUTE ENTRY OF—MONDAY JUNE 21, 1954

Upon the Petition of G. L. Curtis Company for review of order entered by the referee on the ninth day of October, 1953, granting petition of the receiver to sell personal property, filed October 26, 1953; upon the Certificate of Referee dated May 26, 1954, and filed; upon the proceedings had before the referee as appears from his said certificate; and upon orally hearing counsel for the parties,

It Is Ordered that the order of the referee entered herein on the ninth day of October, 1953, ordering the receiver to sell and dispose of certain steel plate described in said order, be, and it is, affirmed.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that G. L. Curtis Company hereby appeals to the United States Court of Appeals for the Ninth Circuit from a final judgment entered in these proceedings on the 21st day of June, 1954, affirming the order of the Referee entered herein October 9, 1953, ordering the Receiver to sell and dispose of certain steel plate described in said order.

Dated this 14th day of July, 1954.

SCRUGGS AND RUCKER.

By /s/ EDWARD W. SCRUGGS,
Attorneys for Appellant.

[Endorsed]: Filed July 14, 1954.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, Wm. H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the matter of Oracle Engineering and Sales Corporation, an Arizona

corporation, Bankrupt, numbered B-641 Tucson, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the attached and foregoing copies of the minute entries are true and correct copies of the originals thereof remaining in my office in the city of Tucson, State and District aforesaid.

I further certify that said original documents, and said copies of the minute entries, constitute the entire record on appeal in said case, as designated in the Appellant's Designation of Record to be included in Record on Appeal filed therein and made a part of the record attached hereto, and the same are as follows, to wit:

1. Referee's Certificate of Review and Record on Review.
2. Minute entry of June 7, 1954.
3. Minute entry of June 14, 1954.
4. Minute entry of June 21, 1954.
5. Notice of Appeal.
6. Designation of Record to be Included in Record on Appeal.

I further certify that a cash cost bond on appeal has been deposited in the Registry Fund of this Court by the Appellant.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal

amounts to the sum of \$1.60 and that said sum has been paid to me by counsel for the Appellant.

Witness my hand and the seal of said Court at Tucson, Arizona, this 18th day of August, 1954.

[Seal] WM. H. LOVELESS,
Clerk,

By /s/ ELAINE R. WHELAN,
Deputy.

[Endorsed]: No. 14488. United States Court of Appeals for the Ninth Circuit. G. L. Curtis Company, Appellant, vs. Kenneth S. Hammes, Trustee in Bankruptcy of the Estate of Oracle Engineering and Sales Corporation, a Corporation, Bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed August 20, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 14488

G. L. CURTIS COMPANY,

Appellant,

vs.

KENNETH S. HAMMES, Trustee,

Appellee.

APPELLANT'S STATEMENT OF POINTS ON
• WHICH IT INTENDS TO RELY ON AP-
PEAL

Appellant herein states that the points upon which it intends to rely on appeal in this action are as follows:

I.

The Court erred in affirming the action of the Referee ordering that the Receiver be authorized and permitted to sell or dispose of personal property described as

193	pes	5/16"	Plate	18"	x	72"	—weight	22,147 #
1	"		"	18"	x	56"		89 #
1	"		"	18"	x	48"		77 #
1	"		"	18"	x	24"		38 #

Total weight 22,351 #

free and clear of liens at public or private sale without notice to creditors and that Allison Steel Manufacturing Company release the personal property

to the Receiver or his order upon payment to said company of their charges, in that said personal property before the filing of the petition for an arrangement under Chapter XI of the Bankruptcy Act in the District Court of the United States in and for the District of Arizona in this case had been pledged to G. L. Curtis Company for a present, fair consideration and possession of said personal property had been transferred from Oracle Engineering and Sales Corporation, the bankrupt, to the possession of G. L. Curtis Company prior to the filing of such petition for an arrangement under Chapter XI of the Bankruptcy Act.

II.

The Court erred in affirming the action of the Referee denying the petition of G. L. Curtis Company for possession of personal property consisting of

193 pcs	5/16"	Plate	18" x 72"	—weight	22,147#
1	"	"	18" x 56"		89#
1	"	"	18" x 48"		77#
1	"	"	18" x 24"		38#

Total weight 22,351#

and overruling the objection of G. L. Curtis Company to the sale of said property by the Receiver free and clear of any claim of lien of G. L. Curtis Company.

III.

The Court erred in affirming the action of the

Referee in refusing to make the following conclusions of law requested by appellant:

The Bill of Sale executed by Oracle Engineering and Sales Corporation to G. L. Curtis Company, Exhibit No. 3, constituted a transfer of the property of Oracle Engineering and Sales Corporation in exchange for a present fair consideration as defined by the Bankruptcy Act.

The notice to Allison Steel Manufacturing Company executed by Oracle Engineering and Sales Corporation, Exhibit No. 4, that the steel was the property of G. L. Curtis Company and the acceptance thereof by Allison Steel Manufacturing Company, Exhibits Nos. 5 and 6, constituted a change of possession within the terms of Section 62-502, Arizona Code Annotated, 1939.

The execution of the Bill of Sale, Exhibit No. 3, and the change of possession of the steel described therein constituted a pledge for the repayment to G. L. Curtis Company of the sum of \$6,500.00 paid by it to M. E. Zetterholm and Ira L. Hart, Trustees, Exhibit No. 1.

By the provisions of Section 62-523, ACA, 1939, the Bill of Sale being accompanied by change of possession, although intended to operate as a lien upon personal property instead of a transfer of ownership, was not required to be recorded to be valid against third persons or creditors of Oracle Engineering and Sales Corporation, and is not fraudulent or voidable by any creditor of the bank-

rupt, or by the Receiver herein pursuant to the provisions of the Bankruptcy Act.

G. L. Curtis Company is entitled to the possession of the steel described in Bill of Sale, Exhibit No. 3, until it is paid the sum of \$6,500.00 by Oracle Engineering and Sales Corporation, or the Receiver herein.

SCRUGGS AND RUCKER,

By/ s/ EDWARD W. SCRUGGS,
Attorneys for Appellant.

Affidavit of mail attached.

[Endorsed]: Filed September 1, 1954.

No. 14488

United States
Court of Appeals
for the Ninth Circuit

G. L. CURTIS COMPANY,

Appellant,

vs.

KENNETH S. HAMMES, Trustee in Bankruptcy of the Estate of
ORACLE ENGINEERING AND SALES CORPORATION,
a Corporation, Bankrupt,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the
District of Arizona

FILED

DEC 10 1954

PAUL B. O'BRIEN,

CLERK



No. 14488

United States
Court of Appeals
for the Ninth Circuit

G. L. CURTIS COMPANY,

Appellant,

vs.

KENNETH S. HAMMES, Trustee in Bankruptcy of the Estate of
ORACLE ENGINEERING AND SALES CORPORATION,
a Corporation, Bankrupt,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court for the
District of Arizona

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ATTORNEYS OF RECORD

SCRUGGS & RUCKER

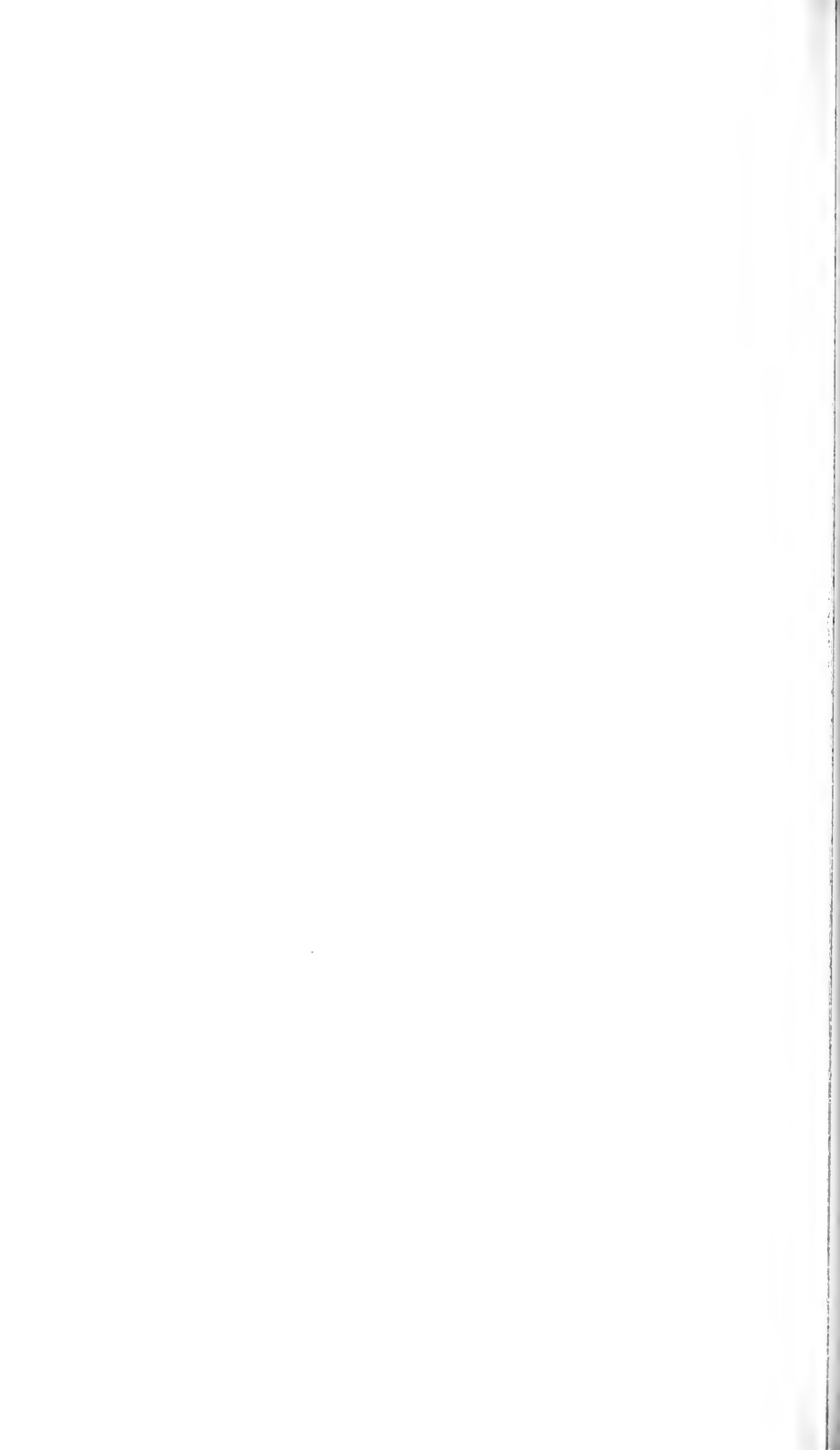
65 West Alameda Street,
Tucson, Arizona,

Attorneys for Appellant G. L. Curtis
Company, Objecting Creditor.

RYLEY, CARLOCK & RALSTON,

514 Title and Trust Building,
Phoenix, Arizona,

Attorneys for Appellee,
Kenneth S. Hammes, Trustee.



BASIS OF JURISDICTION

This is an appeal from a determination by the District Court of the United States for the District of Arizona of a controversy involving not less than \$500.00 arising in proceedings under the National Bankruptcy Act of 1938 as amended (Title 11 U.S.C.). By the provisions of Section 2 of that act (Title 11 U.S.C. 11), the District Court is vested with original jurisdiction of proceedings under the National Bankruptcy Act. The particular question which is presented to this court of appeals came before the judge of the District Court on a petition for review (TR p3) filed pursuant to Section 39c of the Bankruptcy Act (11 U.S.C. 67) of an order entered by the referee in bankruptcy (TR p11) granting a petition to sell personal property (TR p. 20) filed by the receiver and certified to the District Court by the referee on a referee's certificate of review (TR p. 52) affirmed by the District Court June 21, 1954 (TR p. 55) from which the appellant appealed by notice of appeal (TR p. 56) filed July 14, 1954, pursuant to the provisions of section 24a of the Bankruptcy Act of 1938 as amended (11 U.S.C. 47) conferring appellate jurisdiction on the United States Court of Appeals over the courts of bankruptcy.

STATEMENT OF THE CASE

On March 6, 1952, G. L. Curtis Company disbursed for the use of Oracle Engineering and Sales Corporation the sum of \$6,500.00 by delivering its check in said sum to M. E. Zetterholm and Ira L. Hart as Trustees (Exhibit 1 in evidence TR 19 marked exhibit B); that Oracle Engineering and Sales Corporation thereupon delivered to G. L. Curtis Company in consideration of such disbursement an instrument entitled Bill of Sale (Exhibit No. 3 in evidence; TR 16 to 18 inclusive marked exhibit A) wherein was described the steel here in question; that said steel was at that time in the possession of Allison Steel Manufacturing Company in Phoenix, Arizona. (TR 39 and 40) Prior thereto Allison Steel Manufacturing Company had received from Oracle Engineering and Sales Corporation possession of the steel herein involved for fabrication (TR 41). On March 14, 1952, Oracle Engineering and Sales Corporation sent to Allison Steel Manufacturing Company a letter (Exhibit No. 4 in evidence; Creditors exhibit No. 2 TR 45) notifying it of said transaction. Allison Steel Manufacturing Company acknowledged receipt of said notice in a letter directed to Oracle Engineering and Sales Corporation, marked exhibit 5 in evidence (Creditor's Exhibit No. 5 TR 46; Creditor's Exhibit No. 6 TR 47). At the time said notice was received the steel was on the books of Allison Steel Manufacturing Company on an account in the name of Oracle Engineering and Sales Corporation and the name of the account was not changed but the steel remained in the possession of Allison Steel Manufacturing Company

and is now in the possession of Allison Steel Manufacturing Company. The books of Allison Steel Manufacturing Company showed the steel stored for the account of Oracle Engineering and Sales Corporation commencing August 9, 1952. Allison Steel Manufacturing Company has a claim for handling charges and storage on said steel in the amount of \$185.58 (Referee's statement of evidence—TR 39, 40 and 41). The duties of Ira L. Hart and M. E. Zetterholm as trustees in relation to the \$6,500.00 paid to them were set out in a letter establishing a revolving account (Petitioner's exhibit No. 5 TR p. 48). Oracle Engineering and Sales Corporation filed an original petition under chapter X1 of the National Bankruptcy Act (11 U.S.C. 301 et seq) with the District Court of the United States for the District of Arizona, on the 28th day of March, 1952. The matter was referred to Stanley A. Jerman, the referee in bankruptcy, on the 28th day of March, 1952. Kenneth S. Hammes, on the 14th day of April, 1952, was appointed receiver. An adjudication of bankruptcy was entered on the 24th day of July, 1953.

During the course of the proceedings, the receiver petitioned the referee for authority to sell the personal property stored at the plant of Allison Steel Manufacturing Company (TR p. 20). G. L. Curtis Company the appellant herein filed a petition seeking to have the referee determine the appellant to be the owner of the same personal property sought to be sold by the receiver and seeking an adjudication that the receiver had no right to the property (TR p. 14). G. L. Curtis Company also filed objections to the re-

ceiver's petition to sell said personal property (TR p. 30). After a hearing on said petitions and objections, G. L. Curtis Company filed its proposed findings and conclusions (TR p. 24) to which the receiver filed his objections (TR p. 33) and the receiver also filed his proposed findings and conclusions (TR p. 11) to which G. L. Curtis Company filed objections (TR p. 31) and to which objections the receiver replied (TR p. 55). Thereafter the referee entered his findings and order (TR p. 11) which were the findings and order proposed by the receiver, authorizing the receiver to sell the personal property set forth and specifically described in the various pleadings above referred to, and the referee held that G. L. Curtis Company had no valid claim to the personal property as against the receiver. From the ruling of the referee G. L. Curtis Company, the appellant herein, took a review to the judge of the District Court (TR p. 3) and the review was certified to the judge by the referee (TR p. 52) with all of the pleadings filed and a statement of the evidence (TR p. 39) and the exhibits introduced at the hearing. The review was heard by the District Judge (TR p. 55) and the referee was affirmed (TR p. 55). From the holding of the District Court the appellant has appealed.

In his findings and order the referee held: (TR p. 13).

That said bill of sale was given as a chattel mortgage and was unrecorded as of the time of the filing of the original petition herein.

That said chattel mortgage (bill of sale) is valid as between the parties appearing thereon but has no force and effect as against the receiver in bankruptcy herein.

G. L. Curtis contends that the referee and the District Court should have held:

I.

The Bill of Sale executed by Oracle Engineering and Sales Corporation to G. L. Curtis Company, Exhibit No. 3, constituted a transfer of the property of Oracle Engineering and Sales Corporation in exchange for a present fair consideration as defined by the Bankruptcy Act.

II.

The notice to Allison Steel Manufacturing Company executed by Oracle Engineering and Sales Corporation, Exhibit No. 4, that the steel was the property of G. L. Curtis Company and the acceptance thereof by Allison Steel Manufacturing Company, Exhibits Nos. 5 and 6, constituted a change of possession within the terms of Section 62-502, Arizona Code Annotated, 1939.

III.

The execution of the Bill of Sale, Exhibit No. 3, and the change of possession of the steel described therein constituted a pledge for the repayment to G. L. Curtis Company of the sum of \$6,500.00 paid by it to M. E. Zetterholm and Ira L. Hart, Trustees, Exhibit No. 1.

IV.

By the provisions of Section 62-523, ACA, 1939, the Bill of Sale being accompanied by change of possession, although intended to operate as a lien upon personal property instead of a transfer of ownership, was not required to be recorded to be valid against third persons or creditors of Oracle Engineering and Sales Corporation, and is not fraudulent or voidable by any creditor of the bankrupt, or by the Receiver herein pursuant to the provisions of the Bankruptcy Act.

V.

G. L. Curtis Company is entitled to the possession of the steel described in Bill of Sale, Exhibit No. 3, until it is paid the sum of \$6,500.00 by Oracle Engineering and Sales Corporation, or the Receiver herein.

SPECIFICATIONS OF ERROR

1. The court erred in holding to be a chattel mortgage the Bill of Sale given by Oracle Engineering and Sales Company to G. L. Curtis Company covering certain steel therein referred to for the reason that the possession of the steel referred to in said bill of sale was given to G. L. Curtis Company as security for the payment of \$6,500.00 then advanced to Ira Hart and M. E. Zetterholm as trustees and by the provisions of 62-502 ACA 1939, constituted a pledge.

2. The court erred in holding the Bill of Sale found by the Court to be a chattel mortgage had no force and effect as against the Receiver in Bankruptcy for the reason that the transfer of personal property set forth in the Bill of Sale was given for a present fair consideration and was accompanied by an immediate delivery and followed by an actual and continuous change of possession.

3. The court erred in failing to hold that the letter written by Oracle Engineering and Sales Company to Allison Steel Manufacturing Company constituted an immediate delivery and an actual and continuous change of possession within the terms of 62-502 ACA 1939, for the reason that by the provisions of 52-849 ACA 1939 Allison Steel Manufacturing Company was a warehouseman and by the provisions of 52-835 ACA 1939, no creditor of the bankrupt nor the receiver could attach or levy upon

the personal property described in the Bill of Sale after said letter was received by Allison Steel Manufacturing Company and no purchaser from the bankrupts could have thereafter acquired any rights superior to the rights of G. L. Curtis Company.

4. The court erred in holding that the Bill of Sale found by the Court to be a chattel mortgage was required to be recorded to constitute a valid transfer from Oracle Engineering and Sales Company to G. L. Curtis Company as against creditors for the reason that by 62-523 ACA 1939, the Bill of Sale, though a chattel mortgage, accompanied by an immediate delivery and followed by an actual and continuous change of possession, was not required to be recorded to be valid against third persons or creditors of Oracle Engineering and Sales Corporation.

5. The Court erred in holding that the chattel mortgage (Bill of Sale) has no force and effect as against the receiver in bankruptcy for the reason that said Bill of Sale constituted a pledge accompanied by an immediate delivery and followed by an actual and continuous change of possession for security for the performance of an act and was given for a present fair consideration and by the provisions of 62-523 ACA 1939 was not required to be recorded to be valid as to third persons.

6. The Court erred in affirming the action of the Referee ordering that the Receiver be authorized and permitted to sell or dispose of personal property described as

193 pcs	5/16"	Plate	18" x 72"	—weight	22,147 lbs.
1	"	"	18" x 56"		89 lbs.
1	"	"	18" x 48"		77 lbs.
1	"	"	18" x 24"		38 lbs.

Total weight 22,351 lbs.

free and clear of liens at public or private sale without notice to creditors and that Allison Steel Manufacturing Company release the personal property to the Receiver or his order upon payment to said company of their charges, in that said personal property before the filing of the petition for an arrangement under Chapter XI of the Bankruptcy Act in the District Court of the United States in and for the District of Arizona in this case had been pledged to G. L. Curtis Company for a present, fair consideration and possession of said personal property had been transferred from Oracle Engineering and Sales Corporation, the bankrupt, to the possession of G. L. Curtis Company prior to the filing of such petition for an arrangement under Chapter XI of the Bankruptcy Act.

7. The Court erred in affirming the action of the Referee denying the petition of G. L. Curtis Company for possession of personal property consisting of

193 pcs	5/16"	Plate	18" x 72"	—weight	22,147 lbs.
1	"	"	18" x 56"		89 lbs.
1	"	"	18" x 48"		77 lbs.
1	"	"	18" x 24"		38 lbs.

Total weight 22,351 lbs.

and overruling the objection of G. L. Curtis Company to the sale of said property by the Receiver free and clear of any claim of lien of G. L. Curtis Company.

8. The Court erred in affirming the action of the Referee in refusing to make the following conclusions of law requested by appellant:

The Bill of Sale executed by Oracle Engineering and Sales

Corporation to G. L. Curtis Company, Exhibit No. 3, constituted a transfer of the property of Oracle Engineering and Sales Corporation in exchange for a present fair consideration as defined by the Bankruptcy Act.

The notice to Allison Steel Manufacturing Company executed by Oracle Engineering and Sales Corporation, Exhibit No. 4, that the steel was the property of G. L. Curtis Company and the acceptance thereof by Allison Steel Manufacturing Company, Exhibits Nos. 5 and 6, constituted a change of possession within the terms of Section 62-502, Arizona Code Annotated, 1939.

The execution of the Bill of Sale, Exhibit No. 3, and the change of possession of the steel described therein constituted a pledge for the repayment to G. L. Curtis Company of the sum of \$6,500.00 paid by it to M. E. Zetterholm and Ira L. Hart, Trustees, Exhibit No. 1.

By the provisions of Section 62-523, ACA, 1939, the Bill of Sale being accompanied by change of possession, although intended to operate as a lien upon personal property instead of a transfer of ownership, was not required to be recorded to be valid against third persons or creditors of Oracle Engineering and Sales Corporation, and is not fraudulent or voidable by any creditor of the bankrupt, or by the Receiver herein pursuant to the provisions of the Bankruptcy Act.

G. L. Curtis Company is entitled to the possession of the steel described in Bill of Sale, Exhibit No. 3, until it is paid the sum of \$6,500.00 by Oracle Engineering and Sales Corporation, or the Receiver herein.

9. The Court erred in holding that the Receiver was entitled to the possession of the personal property described in the Bill of Sale for the reason that said personal property had been transferred to G. L. Curtis Company, this appellant on account of a contemporaneous consideration accompanied by an immediate delivery and followed by an actual and continuous change of possession and said transfer had become so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract and no bonafide purchaser from the bankrupts could have acquired any rights in the personal property superior to those of the appellants.

PROPOSITIONS OF LAW

1. Notice to a bailee of a transfer of personal property to a third person given by the bailor of such personal property is a change of possession sufficient to validate a pledge.

2. Where a bailee recognizes a transfer to a third person by his bailor of personal property and thereafter holds such personal property for such third person, the third person becomes the bailor of such property and the bailee cannot thereafter transfer such property back to his original bailor without the direction of such third person.

3. Where a bailee acting as a warehouseman is advised by his bailor that the bailed property has been transferred to a third person, such transfer is effective against creditors of the first bailor, though the documentary evidence of the transaction is not recorded.

4. Where possession of personal property is delivered to a vendee named in a Bill of Sale given for the purpose of securing

the repayment of a loan, the transaction is a pledge and is enforceable against creditors even though not recorded.

5. A Bill of Sale found to be in fact a transfer to secure the payment of a loan though not recorded is valid and enforceable against creditors, where the personal property described in the Bill of Sale is delivered to the vendee named in the Bill of Sale.

6. A Bill of Sale held to be a chattel mortgage and not recorded, though defective in form to such an extent that it would be unenforceable as a chattel mortgage even though recorded, when accompanied by delivery of possession to the vendee of the personal property described in the Bill of Sale is enforceable against creditors.

7. Where no provision of state law requires a transfer on account of a contemporaneous consideration accompanied by an immediate delivery and followed by an actual and continuous change of possession to be filed or recorded to be effective against creditors the transfer shall be deemed to have been made or suffered at the time it became so far perfected that no subsequent lien upon such property obtainable by legal or equitable proceedings on a simple contract could become superior to the rights of the transferee and a receiver or trustee in bankruptcy would have no right to the property so transferred under any provision of the Bankruptcy Act.

8. Where no provision of state law requires a transfer on account of a contemporaneous consideration accompanied by an immediate delivery and followed by an actual and continuous change of possession to be filed or recorded in order for the transfer to be so far perfected that no bona fide purchaser from the debtor

could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee, a receiver in bankruptcy proceedings has no right to the possession of the property so transferred.

ARGUMENT

The only basis for any claim to right of disposal of the personal property which is the subject of the issue here must lie in the provisions of Section 70 of the Bankruptcy Act. The answer to the problem must be found in the state law. *Matter of Turley* 92 Fed. 2d 944; *Corn Exchange Natl. Bank and Trust Co. vs Klauder* 318 US 434. For convenience, the applicable portions of the Arizona statutes are here quoted: (*Italics ours.*)

62 ACA 502 Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, *except of personal property when accompanied by an actual change of possession, which is to be deemed a pledge.* The fact that the transfer was made subject to defeasance on a condition, may, to show such transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice) though the fact does not appear by the terms of the instrument.

62-503 ACA 1939. A mortgage is a lien upon everything that would pass by a grant of the property, but does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage. After the execution of the mortgage the mortgagor may agree to such change of possession without a new consideration. . . .

62-521 ACA 1939. No chattel mortgage shall have any legal force or effect except between the parties, unless the residence of the mortgagor and mortgagee, the sum to be secured, the rate of interest to be paid, when and where payable, are set out in the mortgage and the mortgagor and mortgagee make affidavit that the mortgage is bona fide and made without any design to defraud or delay creditors, which affidavit shall be attached to such mortgage.

62-523 ACA 1939. A chattel mortgage or *other instrument of writing intended to operate as a mortgage or lien upon personal property, which is not accompanied by an immediate delivery and followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument is void as against the creditors of the mortgagor or person making the same and as against subsequent purchasers and mortgagees or lien holders in good faith, unless such instrument or a true copy thereof was forthwith filed in the office of the county recorder of the county where the property was then situate. . . .*

Since it is apparent that whether the transaction under consideration constituted a chattel mortgage or a pledge is not of importance until it is first determined if the execution of the Bill of Sale was accompanied by an immediate and followed by an actual and continued change of possession of the property which is the subject of this action, the character of the change of possession which occurred here will be first discussed.

To quote from Restatement of Security, Chapter 1, Section 8:

"Where chattel is in the possession of a third person a pledge may be created by the assent of the pledgor and notification

by either pledgor or pledgee to the third person that the chattel has been pledged to the pledgee.

* * *

"Unless otherwise agreed, there is notification of the pledge to the third person in possession of the chattel to be pledged:

(a) "When the pledgor or pledgee states the fact of the pledge to the third person orally or in writing delivered to him personally. . . ."

This same thought is expressed in 8 C. J. S. Bailments, Section 32, p. 287:

The bailor may sell the subject matter of the bailment, subject to the special property of the bailee, and thereby confer on the purchaser an immediate and valid title thereto, the possession of the bailee becoming that of the purchaser, without any formal delivery of the subject of the bailment to him, a mere notice to the bailee of the sale being sufficient.

Indeed all the authorities point in the same direction: 72 CJS, Pledges, Section 19 (6) p. 23: In the absence of statute, it is immaterial to the validity of a pledge whether the pledgee himself holds the property or a third person holds it for him; and therefore, where all the parties agree that the property shall be held as security for the pledgee, delivery of possession, instead of being made directly to the pledgee, may be made to an agent or trustee of the pledgee; or by agreement, it may be delivered to, or left in the possession of a third person to hold for the pledgee, provided the third person has notice of the trust and accepts the obligation it imposes, and such third person may even be an agent, clerk, or servant of the pledgor. Where the property at the time of the pledge agreement is in the possession of a third person, the pledge may become effectual without further delivery on notification to the third person that the property has been pledged. cf. *Schram v. Sage*, 46 Fed. Sup. 381.

In determining whether delivery was legally effective, the Court may take into consideration the character of the property,

the use to be made of it, the nature and object of the transaction and the position of the parties, Commonwealth Trust Co. of Pittsburgh vs. Reconstruction Finance Corp. 120 Fed. 2d 254.

It is on this theory of change of possession that field warehousing is sustained. 133 ALR 209. Likewise, the delivery of the goods to a depository or pledge holder will constitute such change of possession. Once he accepts the obligation he cannot exonerate himself without notice to all parties. 41 Am. Jur. Pledge and Collateral Security, Sec. 19, p. 399.

And what are the legal consequences when notification is given by the pledgor (bailor) to the third person (bailee), with respect to the pledged property as to the pledgee (new bailor)? To quote from 8 CJS, Bailments, Sec. 37, p. 303:

"On termination of the bailment the bailee is ordinarily under an absolute duty to redeliver to his bailor the property bailed, in the original or altered form, or to account therefore in accordance with the provisions of their contract."

In the instant case the pledge holder (bailee) was acting without compensation from the date of the letters (TR 45, 46, 47, 48). Exhibits 2, 5 and 6) until August 9, 1952. Prior to the latter date the bailee had accepted the obligation to hold the property for the appellant. Thereafter he began making storage charges. While he made the charges against the bankrupts (the receiver) (the appellee here for all purposes) he had no authority to transfer the property back to the bankrupts after he had accepted the notification that he was to hold the property for G. L. Curtis. This is in accord with the accepted law: 41 Am. Jur., Pledge, Sec. 24, p. 602:

An unlawful recovery of possession by the pledgor does not affect the rights of the pledgee.

In Arizona the legislature has declared the policy for the warehouseman which, after all, is the law of bailments:

"52-806 ACA 1939.

A warehouseman, in the absence of some lawful excuse provided by this chapter is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor, if such demand is accompanied with:

An offer to satisfy the warehouseman's lien;

An offer to surrender the receipt if negotiable, with such indorsements as would be necessary for the negotiation of the receipt; and

A readiness and willingness to sign, when the goods are delivered, an acknowledgement that they have been delivered if such signature is requested by the warehouseman.

If the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor so accompanied, the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal.

"52-835 ACA 1939.

A person to whom a receipt has been transferred but not negotiated, acquires thereby, as against the transferor, the title of the goods, subject to the terms of any agreement with the transferor.

If the receipt is nonnegotiable such person also acquires the right to notify the warehouseman of the transfer to him of such receipt and thereby to acquire the direct obligation of the warehouseman to hold possession of the goods for him according to the terms of the receipt.

Prior to the notification of the warehouseman by the trans-

feror or transferee of a nonnegotiable receipt, the title of the transferee to the goods and the right to acquire the obligation of the warehouseman may be defeated by the levy of an attachment or execution upon the goods by a creditor of the transferor, or by a notification to the warehouseman by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor."

But since it might be urged that Allison Steel Manufacturing Company did not become a warehouseman under the definition of 52-849 ACA 1939: "... a warehouseman means a person lawfully engaged in the business of storing goods for profit," as that bailee did not commence charging for storage until August 9, 1952, long after the petition was filed in these proceedings under chapter XI of the Bankruptcy Act, let's look at the law and its requirements for recording or possession of the pledged property.

Generally, the rule is that taking possession of the mortgaged or pledged property is equivalent to recording and also cures defects which could not be cured by filing. *Martin v. Holloway*, 102 Pac. 3; *Security etc. v. Sartori*, 93 Pac. 2d. 863. *Industrial Finance Co. v. Coppleman* 284 Fed. 8. A change of possession is a sufficient substitute for recordation. *Firestone Tire and Rubber Co. v. Cross*, 17 Fed. 2d 417. In *Arizona*, the Supreme Court, in *Moore v. Chilson*, 224 Pac. 818, has stated it this way:

This statute contemplates two classes of persons both claiming, each upon a different base, the first payment of their demands out of the same fund, and undertakes to fix and define the rights of each, the mortgagee on the one side and the creditors on the other. As between the parties to the contract, the mere execution and delivery of the mortgage is sufficient to invest the mortgagee

with all the rights which that instrument purports to convey. When the mortgagor contracts debts, which he cannot pay without recourse to the property which he has already covered by mortgage, his legal obligation under the mortgage is not relaxed merely because the mortgage has not been filed for record. This provision, and the consequences which inevitably flow from it, must be given effect in construing the statute as applied to the rights of the other class, the creditors. As to them it is said the mortgage is absolutely void unless promptly filed for record, or unless there is an immediate change of possession of the property; that is, unless with the delivery of the mortgage to the mortgagee, the mortgagor shall also deliver to him the chattels mortgaged, or, in lieu of that, file for record forthwith the instrument of conveyance, so that by the one means or the other the public or that part of the public which transacts business with the mortgagor, may have a means of knowing who owns the property, and what right or interest the mortgagor may have in it. The device of filing papers for record, and making such filing constructive notice to all concerned, is of comparatively recent origin. Formerly the only means known or employed for giving notice to third persons of ownership in chattels was by actual possession. The substitution for such possession of a filing for record is in fact and in law equivalent. *Ruggles v. Cannedy*, 127 CA1, 290, 53 Pac. 911, 59 Pac. 827, 46 L. R. A. 371.

The statute by its express terms treats the two as of equal import and effect, since the passage of recording statutes, following the rule which the courts had established before that time, that a lien which was void because it was secret on account of the failure to deliver possession of the property involved became valid and established as soon as there was a transfer of possession, as against all persons who had not in the meantime acquired some specific interest in or lien upon the property. *Jones on Chattel Mortgages* (5th Ed.) 178. While the change of possession of the chattels is actual notice to all the world, the filing for record is by law made equally effective as constructive notice, and there would appear to

be no sound reason why a deferred filing of the chattel mortgage should not have the same force and effect as the deferred transfer of actual possession of the chattels mortgaged.

Since we have change of possession, and notice to bailee, what is the nature of the transaction? That is, is it one which requires filing of a chattel mortgage to be effective against creditors as was held by the referee and affirmed by the District Judge?

By the provisions of 62-502 ACA 1939:

Every transfer . . . of personal property when accompanied by an actual change of possession . . . is to be deemed a pledge.

A pledge is really one of the simplest forms of security. It is the passing of the possession of a chattel by the owner thereof to the pledgee who is thereby entitled to hold it until the debt is paid or the obligation performed. *Campbell vs. Peter* 162, Pac. 2d, 754. Also see 41 Am. Jur., Pledge. Nor is the form of the instrument important, nor even its language, but its legal effect which determines its nature. *Holdren vs. Peterson*, 82 Pac., 2d, 1097.

The validity of the pledge and the question whether sufficient delivery has been made are matters for the law of the state where the property was situated when pledged. *Security Warehousing vs. Hand*, 206, US 415.

The referee found the Bill of Sale executed for a present fair consideration accompanied by a delivery of the property sold to be a chattel mortgage. That a Bill of Sale can be found to operate as a chattel mortgage is well established. The law on this subject is reviewed and annotated in 33 ALR 2d. p. 364 et seq. The referee then held that the chattel mortgage was not valid as against creditors though good as between the parties. Without

regard to the form of the Bill of Sale and what effect a recording thereof would have had on the question of notice because of such imperfections, and the distinctions of recording in the recorder's office as between a Bill of Sale and a chattel mortgage, the question arises: Was a filing for record necessary to make the chattel mortgage valid? Again under the law of Arizona where there is a change of delivery of the property and change of possession, no filing or recording is necessary. 62-523 ACA 1939. As pointed out in *Barber vs. Reina Nash, etc.* 260 Pac. 2d. 931, the imperfections of the Bill of Sale as a chattel mortgage would be cured by delivery and possession, although recording would not cure such faults. However, it is not necessary to labor these points. There is no necessity to raise the pledge from its simplest form to a more formal instrument. A pledge need not be in writing and no particular form is required. All that is necessary is a loan of money to the pledgor and a delivery of property to the pledgee to secure the repayment of the loan, the pledgee to retain possession until the loan is paid or condition performed. *Columbia Co. v. Sodini* 156, Pac. 2d 524, *Isak V. Jorney* 15, Pac. 2d 1069.

Since it is manifest that no creditor of the bankrupts at the time of the transfer of the steel to the appellant could have obtained by legal or equitable proceedings upon a simple contract a lien superior to the lien of *G. L. Curtis Company* upon the property, which is the subject of this dispute, under the applicable state law, it follows that under the provisions of Section 70, 60 and 67 of the Bankruptcy Act (11 USC 110, 96, 107) the receiver has no right to the property and that the court should have found that the property should be delivered to *G. L. Curtis Company* by

the receiver. To follow the tortious language of the Bankruptcy Act the only way a receiver could get at the property would be to start with the provisions of Section 67 which in effect provide that when a transfer is required to be recorded or filed to affect creditors of a bankrupt and such a transfer is not recorded or filed then the transfer is deemed to have been made immediately before the filing of the petition. To quote 67d (5):

For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act it shall be deemed to have been made immediately before the filing of such petition.

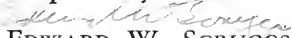
Then after finding that a filing or recording is necessary to perfect the transfer it is necessary to go back to the provisions of Section 60 and find that the transfer though made at the time the consideration was paid was not perfected until the filing of the petition initiating the proceeding and was therefore given for an antecedent debt (by operation of law but without regard to fact) and was by the provisions of Section 67d (5) within the four months period and therefore void. As stated in *Collier on Bankruptcy* 67.40, page 411:

Does 67d (5) convert a transfer by the debtor for a present consideration into a transfer for an antecedent debt merely because the transfer is perfected subsequently to the giving of the consideration by the third person? An affirmative

answer is demanded by the literal language of the provision, the legislative history and the intent of the draftsmen to strike at secret transfers.

So the whole problem remains tied to the meaning of Sections 62-502, 503, 521, 523, 530 ACA, 1939 and the law of bailments and pledges above discussed. It is submitted the judgment of the District Court was in error and should be reversed.

Respectfully Submitted


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No. 14,492

IN THE

United States Court of Appeals
For the Ninth Circuit

RAYMOND J. KASPER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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FILED

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IN THE

**United States Court of Appeals
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RAYMOND J. KASPER,

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Appellee.

APPELLANT'S OPENING BRIEF.

Appellant was tried before a jury and convicted on four counts of an indictment, each count charging an attempt to evade and defeat the payment of taxes due and owing the United States of America and thereby charging a violation of Title 26 U.S.C. Section 145B. (R. Vol. 1, 2-5.)

Count I charged defendant with attempting to evade a large part of his income tax by filing a false and fraudulent return on his income tax for the calendar year 1947 in that the net income shown was the sum of \$3492.64, whereas the defendant's true net income was the sum of \$20,277.45. (R. Vol. 1, 2-3.)

Count II charged the defendant with attempting to evade a large part of his wife's income tax for the calendar year 1947, by filing a false and fraud-

ulent return on behalf of his wife, Lucille B. Kasper, in that the net income shown was the sum of \$3814.08, whereas her true net income was the sum of \$20,519.20. (R. Vol. 1, 3.)

Count III charged defendant with attempting to evade a large part of his income tax by filing a false and fraudulent return on his income tax for the calendar year 1948 in that the net income shown was the sum of \$5000.29, whereas his true net income was the sum of \$7615.13. (R. Vol. 1, 4.)

Count IV charged defendant with attempting to evade a large part of his wife's income tax by filing a false and fraudulent return on behalf of his wife, Lucille B. Kasper, for her income tax for the calendar year 1948 in that the net income shown was the sum of \$5000.29, whereas her true net income was the sum of \$11,404.81. (R. Vol. 1, 4-5.)

The Court sentenced the defendant to a term of four months and a fine of \$1250.00 on each of the four counts (R. Vol. 1, 61), the terms of imprisonment to run concurrently, and to pay costs. From these judgments and sentences, the defendant takes this appeal.

JURISDICTIONAL STATEMENT.

1. The District Court: Jurisdiction was conferred on the District Court by 18 U.S.C. 3231.

2. The Court of Appeals: Jurisdiction of this appeal is conferred upon this Court by 28 U.S.C. 1221, 1294.

3. The pleadings: The pleadings necessary to show the jurisdiction of the District Court and this Court are:

(a) The indictment (R. Vol. 1, 2-5) and defendant's plea of "not guilty". (R. Vol. 1, 7.)

STATEMENT OF THE CASE PRESENTING THE QUESTIONS INVOLVED AND THE MANNER IN WHICH THEY ARE RECEIVED.

1. The nature of the case: The defendant was indicted on four counts of attempting to evade payment of income taxes by filing false and fraudulent income tax returns. Counts I and III charged him with filing false and fraudulent returns on his income tax for the years 1947 and 1948, respectively. Counts II and IV charged the defendant with attempting to evade payment for his wife's income taxes by filing false and fraudulent returns on behalf of his wife for the years 1947 and 1948, respectively.

The respondent grounded its case upon the "net worth theory". Thus, it attempted to prove the appellant's net worth and that of his wife as of December 31, 1946, December 31, 1947 and December 31, 1948. For simplicity, we will refer only to appellant's net worth and mean thereby the net worth of the defendant and that of his wife. The respondent then argued that the increase in net worth in 1947 purportedly shown by it was a result of taxable income for the calendar year 1947, and so similarly for the calendar year 1948.

In support of its case, the respondent sought to construct the defendant's net worth from December 31, 1936 to and including December 31, 1948. As a summary of the government's case, plaintiff introduced in evidence as plaintiff's Exhibit Number 54 a document showing the computation of the defendant's net worth for these years. This exhibit is reproduced as Appendix A to this brief.

The defense was twofold. On the one hand, evidence was introduced to show, not that the government's net worth calculations were wrong as to defendant's net worth as of December 31, 1947 and December 31, 1943, but that defendant's net worth on December 31, 1946, was considerably greater than the government calculated it to be. The difference arises, primarily out of the facts claimed by appellant that he had some \$43,000.00 in cash in his possession when he came to California in 1942 and the government, in its net worth computations, did not give him credit for this sum. The second defense asserted by the defendant was that in fact, and evidence in support thereof was adduced at trial, during the calendar years 1947 and 1948, the years charged in the Indictment, his taxable income, primarily his earnings from his medical practice, had been as reported on the tax returns in question; a table summarizing the proof in this regard is included herein as Appendix B.

The issues involved; There were, therefore, two substantial issues involved; the government had the burden of disproving both of them beyond a reasonable doubt.

1. Did the defendant have \$43,000.00 in cash when he came to Fresno, California in 1942? If he did, then the ostensible increase in net worth as of December 31, 1947 over December 31, 1946 and of December 31, 1948 over December 31, 1947, as shown on Plaintiff's Exhibit Number 54, Appendix A herein, is largely explained and shown, in fact, not to be an increase. Hence, no inference as to the existence of unreported taxable income could be drawn for the calendar years of 1947 and 1948.

2. Did the defendant earn in the calendar years of 1947 and 1948, that income, evidence of which was adduced at trial and which is summarized in Appendix B herein? If he did, the government's case must fall for the taxable income so testified to is not in excess of the taxable income reported on the tax returns for calendar years 1947 and 1948. And this is so, regardless of whether or not the government's calculations as to defendant's increase in net worth for the years 1947 and 1948 are accurate.

SPECIFICATION OF ERRORS.

Specification No. 1.

The Court erred in denying appellant's motion for a judgment of acquittal made at the conclusion of the government's case and again at the conclusion of all the evidence in the case, as to each Count in the Indictment. (R. Vol. 6, 550; Vol. 8, 938.)

Specification No. 2.

The verdict as to each Count is not supported by substantial evidence.

Specification No. 3.

The verdict as to each Count is contrary to the weight of the evidence.

Specification No. 4.

The Court erred in admitting into evidence Plaintiff's Exhibit numbers 47 and 48. These Exhibits are photostatic copies of the Joint Tax Returns filed by defendant and his wife with Internal Revenue in Nebraska for the years 1943-1944, respectively, together with a Certification by the District Director of Internal Revenue for the District of Nebraska.

These Exhibits were objected to as incompetent, irrelevant and immaterial. (R. Vol. 5 396-397.) Motions to strike these Exhibits on the same ground. (R. Vol. 6 547.)

Specification No. 5.

The Court erred in admitting into evidence Plaintiff's Exhibit number 53. This Exhibit is a signed and sworn statement dated March 25, 1952, given by defendant to agents of the Internal Revenue Service regarding defendant's assets, liabilities, earnings, records and so on.

The defendant objected to the introduction of the statement on the ground that the statement was incompetent, irrelevant and an attempt to introduce

admissions of the defendant in the absence of the establishment of the corpus delicti. (R. Vol. 5, 414.)

Specification No. 6.

The Court erred in instructing the jury as follows:

“You may consider in connection with this case the testimony of the so-called character witnesses which have been given and the witnesses who have testified as to the character of the defendant for truth, honesty and integrity in the community in which he lives. That evidence is to be considered by you along with all of the other evidence in the case in determining the guilt or innocence of the defendant.” (R. Vol. 9, 11-12.)

Defendant excepted to the instruction on the ground that the Court should have instructed that proof of good character in this case would be sufficient to give rise to a reasonable doubt. (R. Vol. 9, 26.)

Specification No. 7.

The Court erred in instructing the jury as follows:

“You have one issue in this case that may or may not enter into your consideration in determining the ultimate fact in the case. There was reference in the testimony to a so-called payment of \$2,500.00 to the defendant by a man who, under circumstances that were described as warranting the inference that it was a gift. Now, the jury will have to determine, if that enters into your consideration in the ultimate outcome of the case, as to whether or not that \$2,500.00 payment was a gift or whether or not it was in response to some act done or not done on behalf

of the giver by the recipient of the gift". (R. Vol. 9, 18-19.)

Defendant excepted to the instruction on the ground that it was an instruction which took out of context and laid undue emphasis on a payment which was not in issue since it was not within or for the taxable years in question. (R. Vol. 9, 26.)

Specification No. 8.

The Court erred in instructing the jury as follows:

"Now, I have one further comment to make to the jury which may be of help in determining the issues in this case. The government in this case contends that the defendant filed false and fraudulent income tax returns for the years 1947 and 1948, in that such returns failed to account for substantial net income for the years in question, and thereby that the defendant willfully attempt to evade a large part of income taxes due from him to the United States.

The government asserts that the evidence shows that the defendant failed to keep and preserve adequate books and accounts and records, and destroyed certain records to conceal evidence of his income.

That the evidence shows that by the so-called net worth analysis, that each year commencing in 1942 and including 1947 and 1948 the defendant's assets increased each year, and that such increase could only be accounted for by additional unaccounted for net income which the defendant, they say, willfully failed to report.

Now, that's the contention of the government. The defendant, on the other hand, contends that

there was no increase in his net worth during the years 1947 and 1948 over and above the reported net income which he made because he already, he claims, had large amounts of cash on hand, accumulated over the years from prior earnings and gifts.

The evidence as to these cash accumulations requires your appraisal, members of the jury. That is what you have to examine. You have to determine how you weigh the evidence as to these cash accumulations which are, in my judgment, the determining factor in arriving at a decision in this case on the part of the jury.

Now, in appraising and weighing the evidence in that regard, you should consider all the facts and circumstances, all the testimony and the documents disclosed in the record. Now, I am going to give you an example of what I mean by that:

The defendant contends that he brought with him to California from Nebraska in 1942 a large sum of cash, which he says he accumulated from savings earned in his practice and from gifts. The government claims that this claim should not be accepted because of circumstances which they have put into the record pertaining to borrowings from the bank in Nebraska, statements to the bank in Nebraska, assessment records and tax records concerning the defendant's stay in Nebraska, and similar data of that kind.

You should analyze and consider all of the evidence in connection with this, and from those facts and circumstances you should resolve the truth out of that. I call your attention to this particular phase of the case, not because I am

emphasizing it, but merely by way of illustration. You should apply, in my opinion, the same method of analyzing and weighing the evidence with respect to all the other evidence in the case that has anything to do with the taxable income of the defendant, in order that you may resolve the truth.” (R. Vol. 9, 19-21.)

Specification No. 9.

The Court erred in failing to instruct the jury, as requested in Defendant’s Requested Instruction No. 27, as follows:

“Subject: Proof required as to specific years charged.

In considering the question of the defendant’s income during the years 1947 and 1948, as set forth in the charge herein, certain evidence has been introduced relating to the acquisition, holding or expenditure of funds or property by the defendant. The jury, however, may not assume that the funds or property acquired, held or expended by the defendant were taxable income during the specific years charged in the indictment. The Government has the burden of proving beyond a reasonable doubt that such funds and property acquired, held or expended were taxable income for the specific calendar years in question, and in the absence of such proof beyond a reasonable doubt, the jury must find the defendant ‘not guilty’.” (R. Vol. 1, 31.)

Specification No. 10.

The Court erred in failing to instruct the jury, as requested in Defendant’s Requested Instruction No. 30, as follows:

“Subject: Taxable income for the year alleged—Burden of proof.

You are instructed that the prosecution has the burden of proving beyond a reasonable doubt that the defendant willfully evaded taxes by understating his taxable income on his returns, and those of his wife, for the years alleged in the indictment, 1947 and 1948. It must prove beyond a reasonable doubt that the amounts of any monies or property that the defendant received, held, or expended during the calendar years in question, on which figures the prosecution's case depends, are taxable income. If the evidence in this case leaves a reasonable doubt in your mind as to whether any difference between the reported figures, and those alleged or depended upon by the prosecution, were the result of monies or property accumulated in prior years, or were the result of gifts, or a combination of the two, then it is your duty to resolve that doubt in favor of the defendant and return a verdict of 'not guilty' as to such tax year or years.” (R. Vol. 1, 32-33.)

Specification No. 11.

The Court erred in failing to instruct the jury, as requested in Defendant's Requested Instruction No. 43, as follows:

“Subject: Specific tax years involved—Reasonable doubt.

You are instructed that if the jury determines from all of the evidence that the defendant *Raymond J. Kasper* willfully and knowingly attempted to evade and defeat a large part of the income tax due and owing by him to the United States of America, but cannot ascertain

that beyond a reasonable doubt that the acts of the defendant were committed with respect to the specific calendar tax year 1947, as to counts one and two, and with respect to the specific tax year 1948, as to counts three and four, rather than as to other years, then the jury must not return a verdict on the basis of speculation that such acts took place with respect to the specific years named in the indictment, but must return a verdict of 'not guilty' as to the defendant, *Raymond J. Kasper*." (R. Vol. 1, 42-43.)

Specification No. 12.

The Court erred in failing to instruct the jury, as requested in Defendant's Requested Instruction No. 46, as follows:

"Relative to the testimony pertaining to the character of the defendant in respect to those traits of character which ordinarily would be involved in the commission of an offense like that charged in this case, I would instruct you as follows: Such evidence is regarded by the law as relevant to the question whether defendant is innocent or guilty of the crime charged, because the jury may, if its judgment so directs, reason that it is improbable that a person of good character in such respects would have conducted himself as alleged. Character evidence of itself may be sufficient to raise a reasonable doubt whether or not the defendant is guilty, which doubt otherwise would not exist. Hence, you must consider such evidence in connection with all other evidence in the case." (R. Vol. 1, 45-46.)

Specification No. 13.

The United States Attorney was guilty of prejudicial misconduct in his cross-examination of *Paul Gregg*, a character witness for appellant, by asking him the following questions:

“Mr. Gregg. Did you know, or have you heard that Dr. Kasper was discharged by Dr. Burks for dishonesty?” (R. Vol. 8, 839.)

“Had you known that, would that have affected your opinion as to his reputation—as to the reputation of Dr. Kasper?” (R. Vol. 8, 839.)

ARGUMENT.

I. THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL MADE AT THE CONCLUSION OF THE GOVERNMENT'S CASE AND AT THE CONCLUSION OF THE EVIDENCE. (Specification of Errors Nos. 1, 2, 3, 5.)

At the conclusion of the government's case, taking the government's evidence as having been admitted, the posture of the case was as follows: The government had proved an increase of appellant's net worth in 1947 of approximately \$38,000.00. Equating the increase in net worth with income and making certain deductions for nontaxable income, the government produced a figure of \$36,931.22 as taxable net income for 1947. The appellant had reported a taxable net income of \$7,306.72. Similarly, for 1948, the government showed an increase in net worth of \$28,808.73. Equating that figure with income, and then subtracting certain items of nontaxable income, the government designated the remainder as taxable net income

and produced a figure of \$17,842.72. Appellant's reported income for that year was \$10,000.58. (Plaintiff's Exhibit No. 54—Appendix A.)

Further, assuming as we must, that the government's evidence is given its full weight, the government has shown that the increase in net worth in 1947 and 1948 was not the result of the expenditure in those years of a cash hoard accumulated prior to December 31, 1946, unaccounted for as an asset on Plaintiff's Exhibit No. 54 in the computation of appellant's net worth as of December 31, 1946.

With this foregoing summary, however, we have conceded all that the government's case in chief, and all of the inferences therefrom, can warrant. Is that evidence sufficient to convict? It is urged that it is not.

The government, in order to sustain the burden of proving a net worth case of income tax evasion, must produce evidence that increases in appellant's net worth for the tax years in question were attributable to currently taxable income; or must produce evidence from which the jury could infer that fact. (*Holland v. United States*, U.S., 99 L.Ed. Adv. R. 127.) In the *Holland* case, the government in order to sustain its burden in this regard, proved that the business of defendant increased during the tax years in question, although the defendant reported a fall in profits. The government proved further that a substantial sum of money received by the defendant in the operation of his business in the very tax year for which defendant had been convicted of tax evasion,

some \$12,500.00, had not been recorded in the books of the defendant. As the Supreme Court said in the *Holland* case, comparing it with *United States v. Johnson*, 319 U.S. 303, in which the Supreme Court had affirmed a conviction based on net worth, "There (i.e. *Johnson* case) the taxpayer was an owner of an undisclosed business capable of producing taxable income; here the disclosed business was proven to be capable of producing much more income than was reported and in a quantity sufficient to account for the net worth increases." (..... U.S., 99 L. Ed. Adv. R. 138.)

Now in the instant case, the appellant, unlike the defendant in *Johnson*, engaged in a disclosed pursuit of a profession—the practice of medicine. Unlike the government's case in *Holland*, here the government never proved facts from which it could be inferred that appellant's practice of medicine in 1947 and 1948, was capable of producing a taxable net income of \$36,931.22 and \$17,842.72, respectively. The government's own calculations as to defendant's taxable net income show that in 1943 it was \$4,747.50; in 1944, \$11,109.21; in 1945, \$19,876.52; and 1946, the year immediately preceding the tax years in question, \$6,802.74. (Plaintiff's Exhibit 54, Appendix A.) As a consequence, the government would have us believe that appellant's earnings increased over 500% from 1946 to 1947, despite the fact that his taxable income had decreased by almost 300% from 1945 to 1946, and that a practice which produced a taxable net income in 1946 of \$6,802.74 was capable of producing a taxable net income of \$36,931.22 in 1947.

But even these calculations of prior net worth cannot be used by the government to support its case in this regard, for these figures suffer from the same infirmity that the government's 1947 and 1948 calculations suffer from. The government's calculations as to taxable net income for the years prior to 1947 are based on net worth increases. There is no evidence as to the doctor's earnings in the case that would support an inference that his practice was producing more taxable net income than he was reporting from 1943, the year the appellant entered into private practice in Fresno, California, through 1946. Thus, if the government argues that its net worth calculations for the years 1943 to 1946, inclusive, show a source of taxable income in the appellant's medical practice from which it could be inferred that appellant's net worth increases in 1947 and 1948 were derived, it is in the language of that banal adage, lifting itself by its own boot straps. As an example, suppose the government argues that since the appellant's increase in net worth plus additions amounted to \$20,538.75 in 1945 and since defendant's taxable net income in 1945 was \$19,876.25 (see Exhibit 54, Appendix A) it shows that defendant could have earned from his practice sufficient income to produce a net taxable income of \$17,842.72 for 1948, as the government claims appellant did, in fact, receive. Of course, that would conveniently overlook the fact that according to the government's own calculations, appellant's increase in net worth plus additions in 1946 was \$7,465.24 and his taxable net income for that year was nil. How-

ever, meeting the inference head on, there is no evidence that appellant by his medical practice or in any other way, was capable of producing taxable net income in the amount of respondent calculated for 1945, for its 1945 calculation is based on exactly the same method as its 1947 and 1948 calculations, which method, in its essential characteristic, consists of equating net worth increases with taxable income *and no more*. Yet, the something more—a source capable of producing income in the amount the respondent claims that appellant received, is an essential element in the prosecution's proof in a net worth case, as the Supreme Court held in the *Holland* case.

Several other matters need discussion in this context.

(A) The government produced six witnesses, who testified they were patients of appellant in 1947 or 1948, or in both years. These witnesses are *Henry Hamilton* (R. Vol. 3, 175-183), *Mrs. Arley Gayer* (R. Vol. 3, 183-190), *Mrs. A. M. Delena* (R. Vol. 3, 191-195), *Billie Dias* (R. Vol. 3, 196-199), *Ted Pickup* (R. Vol. 3, 200-206) and *Fred Zullfa* (R. Vol. 3, 207-215). From the testimony of these witnesses, it would appear that they paid appellant a total of approximately \$7,200.00 for medical services during 1947 and 1948. It might be argued that if only six patients paid \$7,200.00 in two years, the jury could infer that appellant had a very substantial practice capable of producing the income the government claims was produced in fact. To this, there are several objections.

(1) The government produced no evidence as to how many patients appellant had during 1947 and 1948.

(2) The average figure of each patient paying \$1,200.00 for medical services in the two years is statistically unreliable because of the errors produced in using such a small sample (i.e. 6). Thus one witness, Mr. Zullfa testified that appellant was treating the witness and the witness' wife and child during 1947 and 1948, that the appellant made as many as 250 calls per year for each of these two years, and that the witness paid almost \$6,000.00 to appellant for medical services during those two years. (R. Vol. 3, 213-214.) One does not have to argue at length that not many families are as unfortunate as the Zullfa family with respect to their health nor that general medical practitioners do not have many such remunerative patients. Another witness, Mrs. Gayer, testified to payments totaling about \$466.00 for the two years. But she also testified that she went to the doctor twice a week during this period for a hypodermic injection of some kind and paid at the rate of \$2.50 per injection. (R. Vol. 3, 184.) Another witness, Mrs. Delena, testified she paid medical fees of \$106.00 in 1947. But this included a bill of \$100.00 for maternity care. (R. Vol. 3, 192.) Without going on in this vein, it can be seen that the testimony of all six of these witnesses can not be used as a proper basis of determining the income from the appellant's medical practice.

(B) It may be argued that though the government in proving a net worth case need not negate each possible nontaxable source of net worth increase (*Holland v. United States*, supra), but if it does prove the negative the inescapable deduction is that the increase in net worth must be due to taxable income. In this connection the government might rely on appellant's statement given to agents of the Internal Revenue Service in 1952, Plaintiff's Exhibit No. 53, particularly at pages 21-24, inclusive, as constituting an admission by appellant that he had received no inheritances during the tax years in question and that his testimony as to the gifts he received support the inference that he did not receive gifts sufficient to account for the difference between his taxable income as reported for the two years in question and the increases in net worth calculated by the government.

While we might agree with the general statement above, the argument should fail for two reasons here:

(1) Conceding admissibility of appellant's extrajudicial statement, Plaintiff's Exhibit No. 53, the statement does not negative all the possible sources of nontaxable receipts, but at best, only two possible sources of nontaxable receipts, i.e. gifts and inheritances are negated. The government may prove a source of taxable income sufficient to account for the increase in net worth, or it may negate receipt of wealth from all nontaxable sources, or it may presumably do both; but it cannot rely solely on negating some sources of nontaxable receipts for, in such case,

it has failed to sustain its burden of proof. If, however, it is held that the admissions are sufficient to negate nontaxable receipts as a source of appellant's increase in net worth, then,

2. The admissions of appellant with respect to his answers in Plaintiff's Exhibit No. 53, to questions concerning gifts or inheritances received by him in 1947 and 1948 are extrajudicial admissions made after the fact to an official charged with investigating the possibility of wrongdoing, and the statement embraces a fact necessary to the proof of an essential element to the case. As such, lacking corroboration these extrajudicial declarations should not have been admitted in evidence. (*Smith v. United States*, U.S., 99 L. Ed. Adv. R. 143.) Certainly the government's case in chief is devoid of any evidence tending to corroborate appellant's admission that he had received no inheritances in the tax years in question. With respect to the matter of gifts for the tax years in question, the only evidence in the record of respondent's case in chief is the evidence of the six patients of appellant's referred to in paragraph A above, wherein each witness, during the course of the government's direct examination, denied making gifts to appellant. This can hardly tend to substantiate an admission as to the receipt of gifts or lack of receipt of gifts from patients as answered by appellant in his statement to the questions of the government's investigators. (Plaintiff's Exhibit 53, pp. 21-24.)

(C) It may be argued that appellant did not have records of his receipts for 1947 and 1948 and therefore the increase in net worth for the years 1947 and 1948 gives rise to the inference that appellant was evading payment of taxes. It is true that in the *Smith* case, *supra*, and in *United States v. Calderon*, U.S., 99 L. Ed. Adv. R. 152, the Supreme Court said that an inference of tax evasion could be based on the fact that the taxpayer's visible assets greatly increased at a time when he was receiving unrecorded amounts of taxable income. Here, however, there is no evidence that defendant was receiving unrecorded amounts of income. The only evidence is that the defendant at some time destroyed a number of his patients' cards, and his log or daybook in which was recorded, daily, the name of each patient and the amount of the bill and whether it was paid or not. However, the appellant did prepare monthly summary sheets from his daily total receipts and yearly summary sheets from his monthly summary sheets. These were not destroyed. There is no evidence indicating that any income received by defendant in 1947 and 1948 was unrecorded anywhere in his records. We are not arguing that the government cannot use a net worth technique to prove its case. What we do urge is that the government has failed to show unrecorded income for the tax years in question and therefore the inference of tax evasion that could have arisen, if such a showing had been made, cannot arise here.

(D) Summarizing our entire argument in this respect, our position is as follows:

We concede that the government showed an increase in net worth in 1947 greater than the taxable income reported by appellant for that year, and we so concede for 1948. But, the government failed to sustain its burden of proof as to the source of that net increase in the taxable years in question because:

(1) The government failed to show a potentiality of taxable income in the tax years in question from which it could be inferred that the increase in net worth was from taxable sources; or

(2) The government failed to negate the possibility that appellant's increase in net worth for the tax years in question arose from nontaxable sources; or

(3) The government failed to show receipt of unrecorded taxable income for the years in question from which, in conjunction with appellant's increases in net worth for those same years, it could be inferred that appellant was attempting to evade payment of income taxes.

II. THE COURT ERRED IN ADMITTING INTO EVIDENCE PLAINTIFF'S EXHIBITS NUMBERS 47 AND 48. (Specification of Error No. 4.)

These exhibits are photostatic copies of the joint tax returns filed by appellant and his wife with the Collector of Internal Revenue in Nebraska for the years 1943 and 1944, respectively, together with a certifica

tion by the District Director of Internal Revenue for Nebraska. Each certification represents that the original tax return had been destroyed pursuant to departmental directive and then goes on to state as follows: "I further state that it was the policy of the Internal Collection District of Nebraska to procure photostats of certain 1943 income tax returns where such returns were involved in criminal or civil investigation which had not been completed at the time such returns were to be destroyed." A similar provision is in the certification of the photostatic copy of the 1944 return. The introduction of these returns with their certifications in effect permitted the government to raise, at the least, an inference that the appellant had been in difficulty with the Internal Revenue Service twice before and, at the worst, the impression that this appellant was an habitual criminal violator of the federal income tax law. Now the exhibit with its certification was certainly not admissible to show that appellant was suspected of prior tax evasion and, in fact, the evidence was offered only as a part of the proof of the government's net worth calculations. However, whatever the value of the proof of appellant's income tax returns for 1943 and 1944 might have been in establishing appellant's net worth, it was certainly outweighed by the prejudicial effect of the certification. Furthermore, in authenticating the photostats as an official record, it would certainly seem necessary to explain at most that the originals had been destroyed pursuant to departmental directive requiring destruction of all

1943 returns. Thus it would appear that the reference to a criminal or civil investigation was a calculated attempt on the part of the prosecution to bring that to the attention of the jury.

III. THE COURT SHOULD HAVE INSTRUCTED THE JURY THAT CHARACTER EVIDENCE MAY ITSELF BE SUFFICIENT TO CREATE IN THE MINDS OF THE JURY A REASONABLE DOUBT AS TO THE GUILT OF THE APPELLANT. (Specification of Errors Nos. 6 and 12.)

At the trial, the appellant produced on his behalf seven character witnesses including his parish priest, two doctors and a prominent businessman. In addition, appellant made as his own witnesses for the purpose of character testimony several of his patients who had testified on behalf of the government. All witnesses testified that appellant had a good reputation. See, for example, the testimony of Monsignor James Dowling (R. Vol. 7, 744), Paul Gregg (R. Vol. 8, 835), Dr. Allison A. Callaway (R. Vol. 8, 840) and Dr. Jack Wilkinson (R. Vol. 8, 843).

The Court instructed the jury in connection with evidence of character: "that evidence is to be considered by you along with all of the other evidence in the case in determining the guilt or innocence of the defendant." (R. Vol. 9, 11-12.) In a case where the outcome may depend in good part on the character of the defendant, the Court's instruction as to the testimony of character witnesses must be stronger than merely stating that it is to be considered along

with all of the other evidence. Particularly should this be true where the nature of the case is such that the prosecution's case is built on a warp of assumptions and a woof of circumstantial evidence, and the defendant, as the Supreme Court pointed out in the *Holland* case, encounters many obstacles in convincing the jury of cash hoards, and "may be entirely honest and yet unable to recount his financial history". (*Holland v. United States*, U.S., 99 L. Ed. Adv. R. 133.)

The Court should have instructed the jury as set forth in Defendant's Requested Instruction Number 46 that "character evidence of itself may be sufficient to raise a reasonable doubt whether or not the defendant is guilty, which doubt otherwise would not exist. Hence, you must consider such evidence in connection with all other evidence in the case." (R. Vol. 1, 45-46.)

In *Edgington v. United States*, 164 U.S. 361, 17 S. Ct. 72, 41 L. Ed. 467, appellant was convicted of the crime of making a false deposition in aid of a fraudulent pension claim. Upon appeal to the Supreme Court, one of the errors assigned was the trial Court's instruction on character evidence. The Supreme Court stated in 164 U.S. at page 366, 17 S. Ct. at page 73, 41 L. Ed. at page 471:

"Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority

now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.”

See, also:

Michelson v. United States, 335 U.S. 469, 93 L. Ed. 168.

In *United States v. Donnelly*, 179 F. 2d 227, Donnelly was convicted of armed robbery. At the trial Donnelly introduced character testimony. The trial Court instructed the jury on this point in substantially the same language as was used in the case at bar. Donnelly requested substantially the same instruction asked here. The Court of Appeals reversed the conviction and held that the instruction requested by Donnelly should have been given.

In *United States v. Wicoff*, 187 Fed. 2d 886, 890, a prosecution for aiding and abetting a bank cashier to willfully misapply funds belonging to a bank, the Court stated “such evidence (character evidence) may itself be sufficient to create in the minds of the jury a reasonable doubt of the guilt of the defendant. (Citations omitted.) This is especially true in cases involving the element of fraudulent intent.” Certainly the case at bar involves “the element of fraudulent intent”. Where, as the Supreme Court said in the *Holland* case, “Trial courts should approach

these cases in the full realization that the taxpayer may be ensnared in a system which, although difficult for the prosecution to utilize, is equally hard for the defendant to refute." (..... U.S., 99 L. Ed. Adv. R. 134) an error in an instruction which placed a greater burden on the appellant than the law requires, prejudiced a substantial right of the appellant and is reversible error.

IV. THE COURT ERRED IN CHARGING THE JURY WITH RESPECT TO AN ALLEGED PAYMENT RECEIVED BY APPELLANT IN THE AMOUNT OF \$2500.00. (Specification of Error No. 7.)

At the trial, evidence was introduced, Plaintiff's Exhibit No. 53, at pages 22 and 23 thereof, and appellant's testimony on cross-examination (R. Vol. 8, 904-908), that appellant received \$2500.00 under the following circumstances: Appellant received a call one night from a man, X. He went to a hotel where he treated a woman for injuries suffered by X cutting his initials on her abdomen with a broken bottle. X was present at the motel. Subsequently, X paid appellant for his services. Subsequent to that date, appellant received \$2500.00 through the mail from someone who remained anonymous, but whose initials corresponded with the initials of X. This occurred prior to 1947. The appellant testified that he considered the \$2500.00 a gift. The incident was not reported to police by appellant.

The Court instructed:

"You have one issue in this case that may or may not enter into your consideration in deter-

mining the ultimate fact in the case. There was reference in the testimony to a so-called payment of \$2500 to the defendant by a man who, under circumstances that were described as warranting the inference that it was a gift. Now, the jury will have to determine, if that enters into your consideration in the ultimate outcome of the case, as to whether or not that \$2500 payment was a gift or whether or not it was in response to some act done or not done on behalf of the giver by the recipient of the gift." (R. Vol. 9, 18-19.)

This instruction was totally unnecessary for the issue could not enter into the case because:

(a) The transaction did not occur during either of the tax years in question, and

(b) It was not an element in the Government's proof of appellant's net worth for any of the years set forth in Plaintiff's Exhibit No. 54. Thus, the instruction raised an issue for the jury where, as a matter of law, none existed.

The instruction was prejudicial because it focussed the attention of the jury on a transaction or event which might have reflected or might have tended to reflect adversely on the character of appellant and which could have certainly affected the jury's consideration of the case.

This instruction was, further, essentially prejudicial since it advised the jury that they could consider, in arriving at their verdict, the nature of this \$2,500.00 as either gift or earnings. This was plain error because the money was received prior to and

outside either tax year in question. The jury, following the Court's instruction, might have decided that this sum was earned income; accordingly found against appellant; and all of this with reference to a sum which without dispute was not received in 1947 or 1948.

V. SPECIFICATION OF ERROR NOS. 8, 9, 10, 11.

The Court instructed in effect that the government claimed to have proved a net worth case, that is, increases in net worth for the tax years in question which could only be accounted for as unreported net income; that the appellant claimed that the appellant's increase in net worth for these two years was not real because he had large amounts of cash on hand accumulated over the years by gifts and earnings. The Court then said:

“The evidence as to these cash accumulations requires your appraisalment, members of the jury. That is what you have to examine. You have to determine how you weigh the evidence as to these cash accumulations which are, in my judgment, the determining factor in arriving at a decision in this case on the part of the jury. Now, in appraising and weighing the evidence in that regard, you should consider all the facts and circumstances, all the testimony and the documents disclosed in the record. Now, I am going to give you an example of what I mean by that:

The defendant contends that he brought with him to California from Nebraska in 1942 a large

sum of cash, which he says he accumulated from savings earned in his practice and from gifts. The government claims that this claim should not be accepted because of circumstances which they have put into the record pertaining to borrowings from the bank in Nebraska, statements to the bank in Nebraska, assessment records and tax records concerning the defendant's stay in Nebraska, and similar data of that kind.

You should analyze and consider all of the evidence in connection with this, and from those facts and circumstances you should resolve the truth out of that.

I call your attention to this particular phase of the case, not because I am emphasizing it, but merely by way of illustration. You should apply, in my opinion, the same method of analyzing and weighing the evidence with respect to all the other evidence in the case that has anything to do with the taxable income of the defendant, in order that you may resolve the truth." (R. Vol. 9, 19-21.)

The charge was bad for two reasons:

(A) It told the jury to find the truth either in the Government's contentions or in the appellant's contentions. The effect of such an instruction is to strip from the prosecution its burden of proving a defendant in a criminal case to be guilty beyond a *reasonable doubt*. In *Bihn v. United States*, 328 U.S. 633, 637, 90 L.Ed. 1480; 1487-1488 the crucial question was whether the petitioner had stolen certain gasoline ration coupons. The Trial Court instructed the jury that they were to decide whether petitioner

stole the coupons, and, if not, who did. The Supreme Court, reversed the conviction stating:

“We assume that the charge might not be misleading or confusing to lawyers. But the probabilities of confusion to a jury are so likely (cf. *Shepard v. United States*, 290 U.S. 96, 104, 78 L.Ed. 196, 201, 54 S.Ct. 22) that we conclude that the charge was prejudicially erroneous.

Instructions to acquit, if there was reasonable doubt as to petitioner's guilt, were given in other parts of the charge. Those were general instructions. They would be adequate, standing alone. But on the crucial issue of the trial—whether petitioner or one of four other persons stole the coupons from the bank—no such qualification was made; and the question was so put as to suggest a different standard of guilt”.

In the instant case, just as in the *Bihn* case, the Trial Court gave proper instructions, couched in general language, on reasonable doubt (R. Vol. 9, 7-8.) But when the Court instructed precisely on a vital issue in the case, it cast its instruction in terms of—either believe the government or believe the defendant—without pointing out the qualification of reasonable doubt. And the Court's charge not only once directed the jury to “resolve the truth” without reference to a reasonable doubt, the court did it twice.

Was the error prejudicial error? The Supreme Court, in the *Bihn* case held that it was prejudicial error because it could not say from the whole record that it *affirmatively* appeared that the error was *not* prejudicial. See also *Bollenbach v. United States*, 326

U.S. 607, 90 L.Ed. 350. In the case at bar, can this Court say that it affirmatively appears from the record that the error committed by the Trial Court in stripping from the appellant the protection of the reasonable doubt rule on this vital issue was not prejudicial error?

(B) The effect of the Court's charge was to eliminate the defense of appellant that he earned in 1947 and 1948 just what he reported. The evidence in this regard summarized as Appendix B to this brief, consisted of the number of various types of cases treated by the doctor, and the rates of payment therefor. This evidence was not controverted by the government.

Now the jury might have believed the government's calculations as to net worth increases in 1947 and 1948. The jury could have disbelieved appellant's explanation of those increases. But the jury could have had a reasonable doubt about appellant's taxable income for the tax years in question based solely on the evidence offered by the defense in this regard. Under such circumstances, the jury would have had to acquit appellant. But the Court by its instruction centered the case on the question of appellant's asserted cash accumulations and thereby misdirected the attention of the jury.

In the *Bollenbach* case above, the Supreme Court reversed a conviction saying "A conviction ought not to rest on an equivocal instruction to a jury on a basic issue". (326 U.S. at page 613, 90 L.Ed. at page 355.) Again, the Court said,

“Accordingly, we cannot treat the manifest misdirection in the circumstances of this case as one of those ‘technical errors’ which ‘do not affect the substantial rights of the parties’ and must therefore be disregarded. (stat. cit. omit.) All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The ‘technical errors’ against which Congress protected jury verdicts are of the kind which led some judges to trivialize the law by giving all legal prescriptions equal potency. See Taft, *Administration of Criminal Law* (1905) 15 *Yale LJ* 1, 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our Courts, and it is these that Congress rendered harmless. (cit. omit.) From presuming too often all errors to be ‘prejudicial’, the judicial pendulum need not swing to presuming all errors to be ‘harmless’ if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be.” 326 U.S. at pages 614-615, 90 L.Ed. 355-356.

In this context the Court’s attention is invited to the fact that appellant requested three instructions. (Defendant’s Requested Instructions Numbers 27, 30 and 43; R. Vol. 1, 31, 32-33, 42-43.)

For the sake of clarity in presenting this contention, appellant respectfully calls to the attention of the Court the following instructions requested by appellant, refused by the Court below, and not embraced in the instruction as given:

(1). With reference to specification of error No. 9 appellant's Requested Instruction No. 27:

"Subject: Proof required as to specific year charged.

In considering the question of the defendant's income during the years 1947 and 1948, as set forth in the charge herein, certain evidence has been introduced relating to the acquisition, holding or expenditure of funds or property by the defendant. The jury, however, may not assume that the funds or property acquired, held or expended by the defendant were taxable income during the specific years charged in the indictment. The government has the burden of proving beyond a reasonable doubt that such funds and property acquired, held or expended were taxable income for the specific calendar years in question, and in the absence of such proof beyond a reasonable doubt, the jury must find the defendant 'not guilty'." (R. Vol. 1, 31.)

(2). With reference to Specification of Error No. 10, appellant's Requested Instruction No. 30:

"Subject: Taxable income for the year alleged burden of proof.

You are instructed that the prosecution has the burden of proving beyond a reasonable doubt that the defendant willfully evaded taxes by understating his taxable income on his returns, and

those of his wife, for the years alleged in the indictment, 1947 and 1948. It must prove beyond a reasonable doubt that the amounts of any monies or property that the defendant received, held, or expended during the calendar years in question, on which figures the prosecution's case depends, are taxable income. If the evidence in this case leaves a reasonable doubt in your mind as to whether any difference between the reported figures, and those alleged or depended upon by the prosecution, were the result of monies or property accumulated in prior years, or were the result of gifts, or a combination of the two, then, it is your duty to resolve that doubt in favor of the defendant and return a verdict of 'not guilty' as to such tax year or years." (R. Vol. 1, 32-33.)

(3). With reference to Specification of Error No. 11, appellant's Requested Instruction No. 43.

"Subject: Specific tax years involved—reasonable doubt.

You are instructed that if the jury determines from all of the evidence that the defendant *Raymond J. Kasper* willfully and knowingly attempted to evade and defeat a large part of the income tax due and owing by him to the United States of America, but cannot ascertain that beyond a reasonable doubt that the acts of the defendant were committed with respect to the specific calendar tax year 1947, as to counts one and two, and with respect to the specific tax year 1948, as to counts three and four, rather than as to other years, then the jury must not return a verdict on the basis of speculation that such acts took

place with respect to the specific years named in the indictment, but must return a verdict of 'not guilty' as to the defendant, *Raymond J. Kasper*." (R. Vol. 1, 42-43.)

The giving of these instructions would have pinpointed for the jury, the proposition that the jury could not assume that mere proof of net worth increases in the years charged in the indictment represented taxable income earned in those years, but the government had to prove that fact, if it be a fact, beyond a reasonable doubt and for those specific years. If the Court had so charged, then the jury would have had before it, as a crucial issue in the case, the evidence offered by the defense as to appellant's earnings in 1947 and 1948 as well as the evidence offered by the government which showed or tended to show that appellant's practice could not produce the taxable income that the government claimed it did produce. The Court, by failing to charge as requested, deprived the appellant of a valid theory of the case essential to his defense.

When "Charges should be especially clear, including, in addition to the formal instruction, a summary of the nature of the net worth method, the assumptions on which it rests, and the inferences available both for and against the accused", *Holland v. United States*, U.S., 99 L. Ed. Adv. R. 134, the Court's emphasis in its charge on one aspect of appellant's defense to the exclusion of the other aspect, was prejudicial and reversible error.

VI. SPECIFICATION OF ERROR NO. 13.

The United States Attorney was guilty of prejudicial misconduct and the trial Court erred in permitting the United States Attorney, in cross-examining appellant's character witness, Paul Gregg, to ask "Mr. Gregg, did you know or have you heard that Doctor Kasper was discharged by Doctor Burks for dishonesty?" (R. Vol. 8, 839.) The rule is settled that in cross-examining a character witness, the proper form for the question asked here, is "have you heard" and not "did you know". *Michelson v. United States*, 335 U.S. 469, 481, 93 L. Ed. 168, 177; *Stewart v. United States*, 104 Fed. 2d 234. One obvious objection to the form "did you know" is that it assumes a fact which, as here, was not in evidence and proof of which would be inadmissible. Secondly, the point of reputation testimony is to ascertain the general talk of people about the defendant rather than the witness' own knowledge of him.

Here, the United States Attorney said "Did you know or have you heard." It is submitted that the form used is just as objectionable as if the phrase "did you know" had been used alone.

Further, the prosecution then proceeded to ask "Had you known that, would that have affected your opinion?" (R. Vol. 8, 839.) While the Court sustained appellant's objection to the question, the asking of the question in the form "had you known that" certainly suggested to the jury, and not very subtly, that it was a fact that Dr. Burks had discharged appellant for dishonesty. The error was compounded by the

Court below when it remarked in response to appellant's objection to the first question, "I have to assume that the question is asked in good faith by the government." (R. Vol. 8, 839.)

It would appear that the error was prejudicial for the imputation that appellant, a doctor, had been discharged for dishonesty by another doctor could hardly fail to impress the jury in their evaluation of appellant's testimony and defense.

CONCLUSION.

It is most respectfully submitted that where the government's technique of proof in the criminal case now before this Court, while proper, "is so fraught with danger for the innocent that the Court must closely scrutinize its use", *Holland v. United States*, U.S., 99 L. Ed., Adv. R. 132 the errors committed by the trial Court and the prejudicial misconduct of the United States Attorney demand a reversal of the judgment of conviction of appellant.

Dated, San Francisco, California,
January 26, 1955.

DAVIS & COLVIN,
REYNOLD H. COLVIN,
SIDNEY FEINBERG,
Attorneys for Appellant.

(Appendices A and B Follow.)

Appendices A and B.

5

Stahl

5

Sch.

10

14

Sch.

Sch.

Sch.

Sch.

to %

to

APPENDIX A
COMPUTATION OF NET WORTH
DECEMBER 31, 1936 to DECEMBER 31, 1948
RAYMOND J. AND LUCILLE B. KASPER
FRESNO, CALIFORNIA

DATE	ASSETS	12/31/36	12/31/37	12/31/38	12/31/39	12/31/40	12/31/41	12/31/42	12/31/43	12/31/44	12/31/45	12/31/46	12/31/47	12/31/48
10	Wahoo State Bank - Checking Acct.	182.39	202.94	409.10	193.31	383.63	209.99							
11	" " " - Savings Acct. #308				750.00									
28	Bank of America - Fresno - Checking Acct.							3.00	3.00	3.00				
31	" " " - Savings Acct. #5027							970.22	308.65	467.02				
31	Security First Nat. Bk. - Fresno - Acct. #67508								4,514.50	3,014.67	453.15	413.15	40.92	601.34
31	T. S. Series E Bonds										5,115.69	5,166.96	5,231.74	5.00
7	Notes Rec. - Edward Kirkman										1,002.50	4,424.79	5,049.41	5.00
3	Real Estate - Farm in Nebraska					8,000.00	8,000.00	8,000.00			806.25	806.25	8,306.25	6,325.00
4 & 5	" " " - 1058 Nn. Chestnut, Wahoo, Neb.	3,000.00	3,000.00	3,000.00	3,000.00	3,000.00								
6	" " " - 2102 So. 8th St., Omaha, Neb.	2,800.00	2,800.00	2,800.00										
7	" " " - 1206 Thorne Ave., Fresno								7,761.10	7,761.10	7,761.10	7,761.10	7,761.10	
3 - Sch. D	" " " - Imp. to above property									5,238.90	5,238.90	5,238.90		
8	" " " - 80 acre Dairy Farm												36,529.74	36,529.74
9 - 10	" " " - Lots 166-167 (5250 Van Ness Ave., Fresno)												1,000.00	10,009.33
11(a)	" " " - Home on above property													43,266.12
11	Sprinkler System and Garden Impr.												782.50	
17	Household Furnishings - Slater's											19.37	19.22	1,531.26
18	" " " - Turpin's												738.62	
19	" " " - Street's Drapery													1,336.61
15	" " " - McWhan's							517.72	544.27	703.68	767.58	1,247.64	1,247.64	
19	" " " - Roth								446.78	515.56	515.56	515.56	515.56	
30	Improvements to home - Miller													1,150.00
13-14	Linoleum for home - Sullinger													958.78
12	Oriental Rug - Emporium													5,329.50
20	Fur Coat - Sable Fur Co.										812.25	812.25	812.25	812.25
47 - Sch. C	Plymouth Car - 1942						1,104.00	1,104.00	1,104.00					
48 - Sch. F	Packard Car - 1942									2,050.00	2,050.00			
5 - Sch. F	Packard Car - 1946											2,050.00	2,050.00	2,050.00
16	Packard Car - 1948													3,949.25
1 - Sch. D	Airplane - Per 1947 return												2,006.00	
47 to 50)	Medical Office Equipment - 1943 to 1948													
1 to 6)	Net Worth in Schedule F	3,200.00	3,200.00	3,200.00	3,200.00	3,200.00	3,200.00	1,000.00	1,000.00	1,000.00	1,500.00	1,500.00	3,000.00	4,000.00
39	Net Worth in Schedule - Wahoo													
	TOTAL	8,282.29	9,002.94	9,209.10	6,943.31	14,383.63	15,313.99	1,077.22	15,302.72	20,791.46	25,890.30	31,481.91	77,541.35	121,132.50
	LIABILITIES													4,129.50
12	Due to Emporium, Inc., S.F.													
Wahoo State Bk. - R. E. Loan	2,768.42	2,638.09	2,512.76	2,357.02	2,205.63	2,046.50								
44 - 45	" " " - Personal Loan 6437					100.00								
44 - 45	" " " - " " " 6668					400.00								
44 - 45	" " " - " " " 3629	100.00												
14	" " " - O. F. Neal, Omaha					6,000.00	5,817.75							
15	" " " - Equitable Life Assurance Co.							5,500.00						
23	" " " - Jacob Machlin								4,781.89					
31-H-4	Bank of America - 10-2438 Farm											10,000.00	9,000.00	
31-H-5	" " " - 10-2552 Home												14,000.00	
	TOTAL	2,868.42	2,638.09	3,012.76	2,357.02	8,205.63	7,864.25	5,500.00	4,781.89				10,000.00	27,129.50
	Net Worth at End of Year	6,113.97	6,364.85	6,196.34	4,586.29	6,178.00	7,449.74	5,577.22	10,520.83	20,791.46	25,890.30	31,481.91	67,541.35	94,000.00
	Net Worth at Beginning of Year	6,113.97	6,364.85	6,196.34	4,586.29	6,178.00	7,449.74	5,577.22	10,520.83	20,791.46	25,890.30	31,481.91	67,541.35	94,000.00
	Increase in Net Worth													
	" " " - 1936-37		251.88	(168.51)	(1,610.05)	1,591.71	1,271.74	(1,872.52)	4,943.61	10,207.63	5,008.84	5,591.61	36,059.44	26,466.65
	Additions													
7-1d. & 51	Federal Income Taxes Paid	None	None	None	None	None	None	None	155.14	400.00	1,167.65	240.00	1,012.09	778.00
	" " " - (1.25)													
	Life Insurance - Premiums Paid													
16	Mutual Life Insurance Co.									10,792.92				
25	Prudential Life Insurance Co.									2,408.26		482.55		
26	United Benefit Life Ins.									962.00				1,473.00
27	Western Bohemian Fmt. Life Ins.									89.08		89.08	89.08	89.08
1 - Sch. D	Capital loss on airplane - non deductible portion												870.00	
	Increase in Net Worth Plus Additions													
	" " " - 1936-37													
	Reductions													
16	Refund of Ins. Prem. - Mutual Life Ins.													4,852.06
16 - 22	Dividends on Life Ins. - " " "													161.25
21	" " " - Prudential Life												36.80	40.20
1 - Sch. D	Capital gain on sale of home - non-taxable portion													3,500.00
	Depreciation Claimed on Return													
	Automobile - Sch. F								250.00	512.50	512.50	512.50	512.50	512.50
	Office Equipment - Sch. F								100.00	100.00	150.00	300.00	400.00	400.00
	Farm Equipment - Form 1040-F, Page 3												250.00	1,500.00
	Total Reductions								350.00	612.50	662.50	812.50	1,092.50	10,966.01
	Balance - Taxable Net Income	251.88	(168.51)	(1,610.05)	1,591.71	1,271.74	(1,872.52)	4,943.61	11,109.21	19,876.25	6,802.74	36,931.22	17,842.72	
	Net Income for Returns - 1943 - 1948								2,480.40	4,175.30	5,652.63	7,204.87	7,204.87	10,000.00
	Unreported Income - 1943 - 1948								2,240.10	6,933.91	13,223.62	(502.13)	29,624.50	7,842.14

Appendix B

PROFESSIONAL EARNINGS

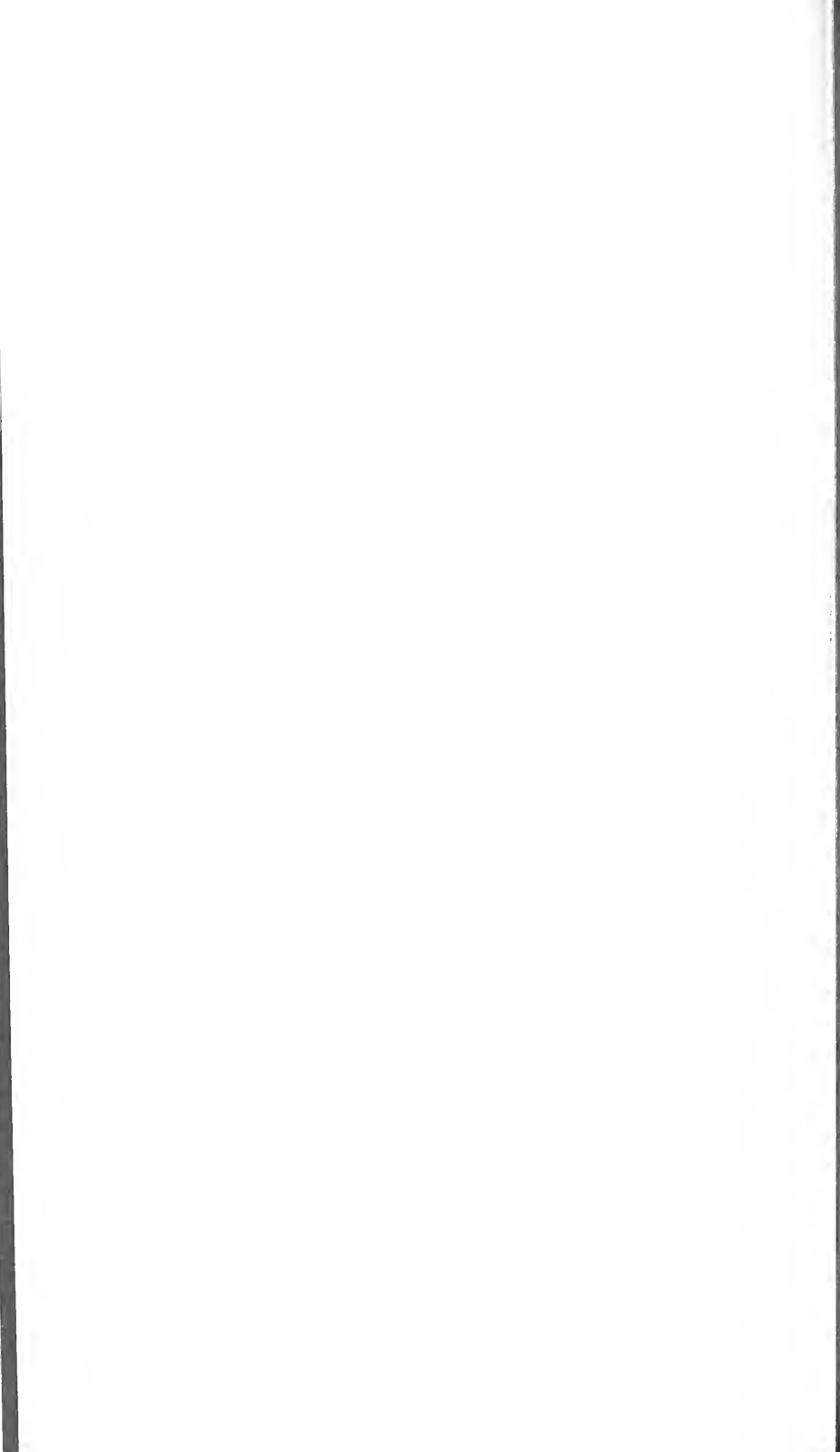
COMPUTED vs. ACTUAL

1947 and 1948

FROM SERVICES

Office Calls—16 per day—320 per month @ \$3.00=	\$960.00/mo.
House Calls—1 night @ \$6.00 and 2 day @ \$4.00, 30 days=	420.00/mo.
Confinements—4 per mo. @ \$50.00=	200.00/mo.
Major Operations—20 per year @ \$150=\$3,000.00=	250.00/mo.
Minor Operations—5 per month @ \$30.00=	150.00/mo.
Lab. Work	60.00/mo.
Total—Per month	<u>\$2,040.00</u>
Total—Per Year (12 x \$2,040.00)	<u>\$24,480.00</u>
Less: Losses From Unpaid Charges to Patients—33 $\frac{1}{3}$	<u>8,160.00</u>
Gross Income—Computed Cash Basis—Per Year	<u>\$16,320.00</u>

<u>Year 1947</u>	<u>Computed Income</u>	<u>Income Tax Return Reported Income</u>
Gross Income	\$16,320.00	\$16,486.35
Office Overhead—Actual	7,760.08	7,760.08
Net Income	<u>\$ 8,559.92</u>	<u>\$ 8,726.27</u>
 <u>Year 1948</u>		
Gross Income	\$16,320.00	\$16,727.10
Office Overhead—Actual	8,930.17	8,930.17
Net Income	<u>\$ 7,389.83</u>	<u>\$ 7,796.93</u>



No. 14,492

IN THE

United States Court of Appeals
For the Ninth Circuit

RAYMOND J. KASPER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District Court
for the Northern District of California.

BRIEF FOR THE UNITED STATES.

LLOYD H. BURKE,

United States Attorney.

ROBERT H. SCHNACKE,

Assistant United States Attorney.

422 Post Office Building,

Seventh and Mission Streets,

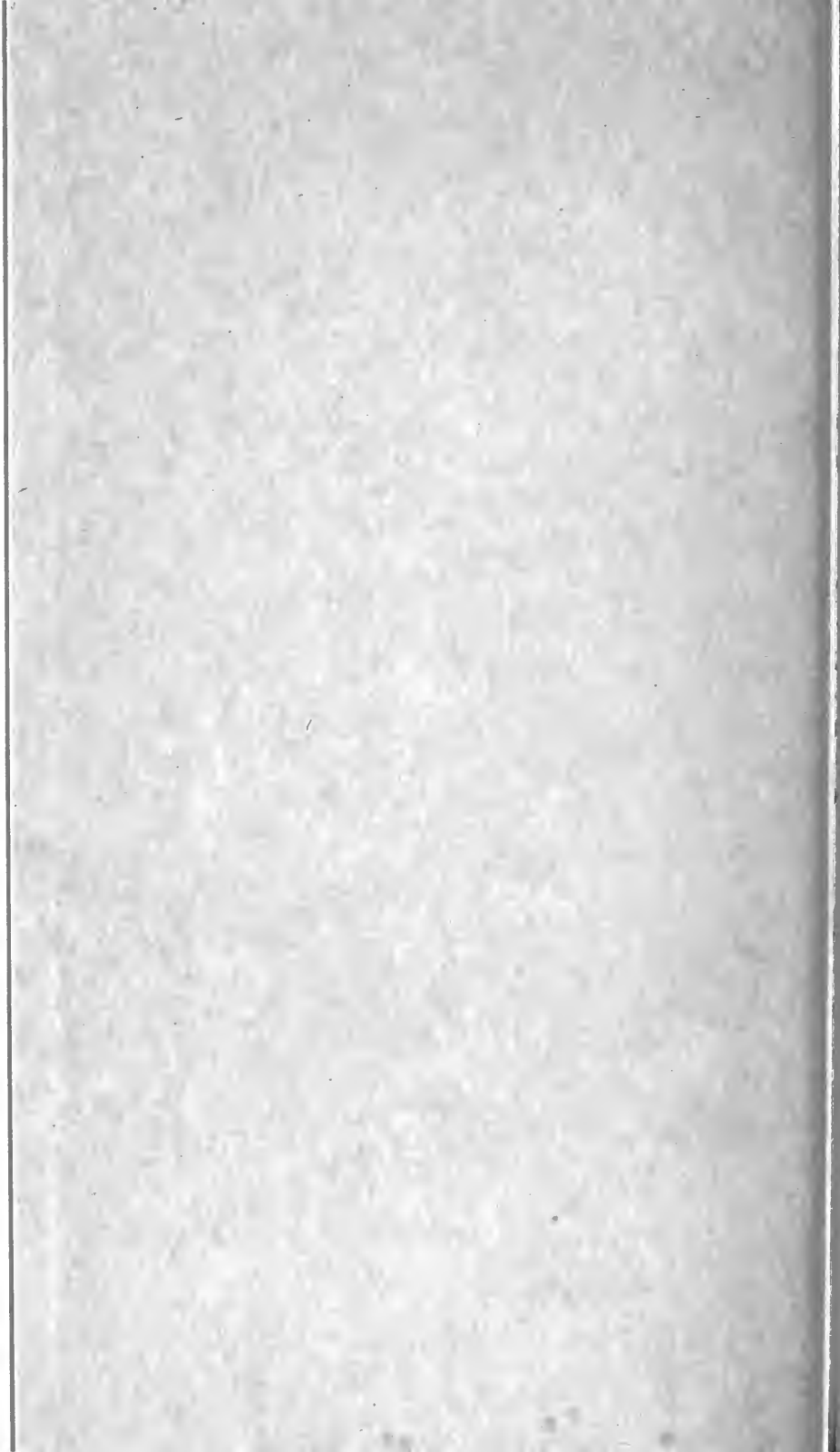
San Francisco 1, California,

Attorneys for Appellee.

FILED

MAR 1 5 1955

PAUL P. O'BRIEN,
CLERK



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RAYMOND J. KASPER,

Appellant,

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UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the Northern District of California.**

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

Appellant herein was convicted (R. Vol. 1, p. 62)* on four counts of an indictment (Vol. 1, pp. 1-5) charging him with attempting to defeat and evade income taxes by filing false and fraudulent returns for the years 1947 and 1948. It was charged that by the

*The record herein is typewritten and in nine volumes. The numbering is not consecutive. Volume 1 contains pages 1 to 73; Volumes 2 to 8 contain pages 1 to 938A; Volume 9 (Instructions to Jury) contains pages 1 to 32. References herein to the record, *without* a volume number will refer to pages in Volumes 2 to 8, inclusive. If references are intended to Volumes 1 or 9 the volume number will be cited.

false returns appellant understated the income of himself and his wife for the two years by a total sum of \$42,509.29 and evaded taxes in the total sum of \$15,041.14.

Appellant is a doctor of medicine. He began his practice in Wahoo, Nebraska, a town of some 3,000 people, in 1934 (R. 749) and practiced there until 1942. (Pl. Ex. 53, p. 2.) He left Nebraska in 1942 to work for a few months at a railroad hospital in Missouri at a salary of about \$175.00 per month. (Pl. Ex. 53, pp. 2-3.)

Appellant came to Fresno, California in October of 1942 and went to work for another doctor at a salary of \$500.00 per month. (R. 58.) This employment was terminated in 1943 and appellant began to practice for himself. He continued to practice through and after 1948. (Pl. Ex. 53, p. 11.)

Appellant's unreported income was computed on the net worth basis. Appellant's net assets as of October, 1936 were, by his own statement (Pl. Ex. 39), far less than \$8,000. His net worth did not get to be more than \$8,000 during any of the time he lived in Nebraska. (Pl. Ex. 54. See App. X App. Opening Brief.)

When appellant came to Fresno in 1942 his net assets were considerably less than \$10,000. In six years, by the end of 1948, his net worth had increased to over \$90,000. During that entire six year period appellant had reported a total income of less than \$38,000. (Pl. Ex. 54.) After various adjustments, but without any provision for living expenses, the net worth computa-

tion demonstrated unreported income of \$29,624.50 for the year 1947 and \$7,842.14 for the year 1948.

The revenue agent assigned to this case spent about 2½ years investigating the affairs and assets of appellant. (R. 493.) He checked for assets at all places where appellant had resided from 1936 through 1948, checked records in recorder's offices, assessor's offices, banks, insurance companies, department stores, etc. and found no assets nor liabilities for significant dates, other than those set forth in Plaintiff's Exhibit 54. (R. 496-501.)

In attempting to account for the obvious increases in his wealth which occurred after his arrival in Fresno, appellant claimed that he had saved \$300 to \$400 a month from his medical practice in Nebraska (R. 761) [which he stated never produced more than \$5,000 per year, gross (Pl. Ex. 53, p. 2)] and that this accumulation, plus certain moneys he claimed were given to him, were concealed in a hollow tile in the basement of his home and were brought to California. This cash hoard was said to amount to \$40,000.

\$12,000 of the \$40,000 was claimed by appellant to have been given him by his mother just before her death, in order to equalize a gift of three houses by the mother to appellant's sister (R. 562), but appellant's aunt, called as a witness by appellant, denied that there was any such gift to equalize, because the true fact was that upon the death of appellant's mother she left five parcels of land, three to her husband, one to appellant's sister and one to appellant. (R. 603-604.)

Appellant's medical practice in Nebraska was very poor. He left Nebraska because he was not making a go of it there. His practice was so lean that he didn't pay his medical dues there because he couldn't afford to. (R. 385-388.)

The first year in which appellant reported any taxable income to the Internal Revenue Service was 1943. The records of the Internal Revenue Service show that during all the time he practiced in Wahoo, the years 1942 and before, appellant either filed no return at all or, if he filed a return, he showed no net taxable income and no tax due. (Pl. Ex. 51.)

While in Nebraska appellant made a number of small loans from the bank in Wahoo, the first in February, 1935 and the last on March 7, 1942. (Pl. Ex. 44 and 45. R. 324-326.) The amounts of these loans ranged from \$70.00 to \$475.00 at interest rates of 7% and 8%.

In each of the years 1936 to 1942, inclusive, appellant stated under oath to the Tax Collector at Wahoo, Nebraska, that he had no unbanked cash in his possession excepting \$90.00 in 1939, \$200 in 1940 and \$100 in 1941. (Pl. Ex. 46.)

Appellant claimed that the small loans he had made in Nebraska were made not because he needed the money but because he thought he could establish his credit by borrowing money and promptly repaying it. He was unable to explain why, after eight years of practice, he should still be trying to establish his credit by making a \$200 7% unsecured loan from the

bank at Wahoo, just two months before he left there, nor how he expected to establish his credit by paying off a loan, due in April 1939, some three months after the maturity date, in July 1939. (R. 856-859.)

On November 24, 1942, about a month after his arrival in California, appellant asked for and received an advance of salary in the amount of \$200 from his employer. (R. 61.)

After a few years of practice in Fresno appellant showed a predilection for using cash rather than checks in his business transactions. On one occasion when he used a check to make a payment in connection with the purchase of property he later withdrew the check and gave cash instead. (R. 70-71.) In the construction of his home, at a cost of \$43,298.62, he paid the contractor \$29,273.13 in cash in various periodic payments, and the balance was paid with three checks drawn by others to appellant or his wife and endorsed over to the contractor. (R. 83-90.)

Checks received by appellant for services rendered by him to his patients (Pl. Ex. 22, 23, 24, 25 and 26) were generally not deposited (Pl. Ex. 27) in the commercial account maintained by appellant (R. 220-221), but instead, were used to make payments on appellant's bank loans (R. 247-256, 267-270), or were cashed (R. 258-263, 265), or were used to purchase cashier's checks or money orders. (R. 264-266.) He paid substantial amounts of cash to purchase savings bonds (Pl. Ex. 32) and he made very frequent visits to his safe deposit box. (Pl. Ex. 38.)

When the Internal Revenue agent attempted to examine appellant's records he was told that some of the records had been destroyed, and as to the records remaining he could look at them providing they were returned the same afternoon. (R. 504-505.)

The basic records used by appellant in computing his income from his medical practice were his patient cards and a date book or log book. Appellant kept a separate card for each patient. At the time of treatment, the date, treatment data, charge, payment, and balance owing were entered on the patient card. Charges and payments were entered daily from the patient card to the log book. With the log book there was kept a monthly total of daily receipts and an annual summary of monthly receipts. (Pl. Ex. 53, pp. 15-16; R. 875-877.) All expenses of the business were paid by check and a summary of the expenses was included in the annual summary. (Pl. Ex. 53, p. 18; Def's Ex. I & J.)

The Internal Revenue agent found several hundred patient cards, but appellant claimed to have only eight cards containing any data concerning the year 1947 and only about 30 cards concerning the year 1948. (R. 507-508.) The patient cards for years before 1949 were destroyed "because they were getting dirty". (Pl. Ex. 53, p. 19.) Log books for years 1944 to 1950 were destroyed by appellant because appellant had "a peculiar idiosyncrasy of checking back through old ledgers and worrying about patients who hadn't come back" and making himself miserable thereby. So he destroyed them to "keep myself happy." (Pl. Ex. 53,

p. 19.) Appellant burned these records some time before March of 1950. (Pl. Ex. 53, pp. 20-21; R. 891-898.) Appellant received no inheritances (Pl. Ex. 53, p. 21) and he does not know that he received any gifts, during the years 1947 or 1948. (R. 909.)

ARGUMENT.

I. THE MOTIONS FOR JUDGMENT OF ACQUITTAL WERE PROPERLY DENIED; THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT.

Appellant's Specifications of Error 1, 2, 3 and 5 are said to be covered by appellant's first argument. These specifications of error are (1) error in the denial of appellant's motion for a judgment of acquittal, (2) and (3) that the verdict is not supported by, and is contrary to the evidence and (5) that plaintiff's Exhibit No. 53, a question and answer statement given and signed by the defendant, was improperly admitted prior to the establishment of the corpus delicti.

Appellant makes no argument with respect to the fifth specification. His argument is predicated exclusively upon the proposition that the Government failed (1) to establish that there was a potential source of taxable income for the years 1947 and 1948, (2) to negate the possibility that the increase in net worth arose from nontaxable sources and (3) to show the receipt of any unreported taxable income during the years 1947 and 1948.

Appellant concedes that the evidence against him established a substantial increase (some \$62,528.09) in his net worth during 1947 and 1948.

It is, of course, true that, in establishing unreported income by the net worth method, the Government has the obligation to establish that the taxpayer is in an income producing business from which income could be derived. See Balter, *Fraud Under Federal Tax Law*, 2nd Edition, page 426. This simply means that there be an income producing business, and not that the Government must establish specific items of reported income. *United States v. Chapman*, 168 F.2d 997, 7th Cir. 1948.

Appellant must concede that he was in an income producing business. He had engaged for a long time in the practice of medicine and even by his own figures (Appendix B, Appellant's Opening Brief), he performed services for patients for which he charged an average of \$24,480 per year in 1947 and 1948. It was necessary, of course, for appellant in some way to reduce this amount to one that approached the amount of income actually reported on the tax returns. (\$7,306.72 for 1947 and \$10,000.58 for 1948.) To accomplish this, appellant claimed that one-third of his charges to patients were never paid. Regardless of this, it is quite clear that the appellant's medical practice produced substantial amounts of income.

It was, of course, impossible to establish any specific item of unreported income, because appellant had destroyed the only records from which could be determined what income had been reported and what income had been omitted. If it were necessary for the Government in every net worth case to show some

specific item of unreported income it "would be tantamount to holding that skillful concealment is an invincible barrier to proof." *United States v. Johnson*, 319 U.S. 503. It is exactly this type of situation that the net worth method of proof was designed to meet.

Appellant has suggested that the testimony of the witnesses who were patients of appellant establishes less income than was actually stated on the tax return. That, of course, was the case since only six patients were called as witnesses. No more could be called or located because appellant had refused to permit the Internal Revenue agents to ascertain the names of his patients, and because the records were destroyed. The agents were able to obtain the few names that were discovered only by checking records at three hospitals located in Fresno. (R. 509.) These witnesses were called, not for the purpose of establishing the extent of appellant's practice, but rather to identify certain checks which appellant had received as compensation for medical services and to show appellant's method of dealing with his receipts, that is, making payments on bank loans (R. 247-256, 267-270), or purchasing cashier's checks or money orders (R. 264-266), or receiving cash for them. (R. 258-263, 265.)

The possible source of income was adequately demonstrated, and it, along with the uncontradicted and substantial increase in net worth during the years in question, properly gives rise to the inference that the net worth increase derived from unreported income from the practice of medicine. This is particularly so

in view of the fact that appellant had destroyed all records which would show what the actual receipts from his medical practice might have been.

Appellant argues, further, that the Government did not negate all sources of nontaxable income for the years 1947 and 1948 but only showed that appellant could not account for the net worth increase by gifts or inheritances. Neither in his pre-trial statement (Pl. Ex. No. 53), nor in his testimony at the trial did appellant suggest any other possible kinds of nontaxable income as the source of his expenditures. What is more, the agent, in the course of his investigation of appellant's assets and liabilities, checked all the banks in the area where appellant resided and found no leads to any loans, assets or liabilities of appellant other than as reflected on the net worth statement for the significant dates. In *Holland v. United States*, 348 U.S. 121, 135-136, it was said that the Government must track down "relevant leads furnished by the taxpayer—leads reasonably susceptible of being checked, which, if true, would establish the taxpayer's innocence." That, and more, was done in this case.

Appellant himself narrowed the issue by his pre-trial statements, and by his testimony at the trial, to the contention that the expenditures made during the years 1947 and 1948 were made from some \$40,000 he had saved in Wahoo, Nebraska and brought to Fresno, and which was still on hand at the beginning of 1947. The impossibility of this was adequately demonstrated by evidence showing the nature and extent of appellant's medical practice in Nebraska, by his borrowings

of small amounts of money, by his need for a salary advance shortly after arriving in Fresno, by his sworn declaration in Nebraska that he had no cash on hand, and by the fact that he filed no income tax returns indicating income sufficient to have accounted for the accumulation of the cash hoard he claimed. The situation here is exactly the same as in *Friedberg v. United States*, 348 U.S. 142, where the Supreme Court, after reciting the limited financial means of the taxpayer there during the years prior to the years charged in the indictment, (substantially the same as in this case) went on to say, (at page 144) "Yet it was during these years . . . that petitioner claimed to have accumulated 'far in excess' of \$60,000. We think the jury could readily have concluded that petitioner had saved no such reserve."

The evidence clearly established the increase in appellant's net worth. The only leads supplied by appellant, in an effort to prove that the net worth increase was attributable to prior accumulations of cash, were negated by overwhelming evidence. A source of income was demonstrated, and the evidence showed that the funds expended during the years 1947 and 1948 had not been derived from nontaxable sources. The proof meets fully the requirements of the Supreme Court in the "net worth" cases recently decided. *Friedberg v. United States*, supra; *United States v. Calderon*, 348 U.S. 160; *Smith v. United States*, 348 U.S. 147, and *Holland v. United States*, supra. The Court had no alternative but to deny appellant's motions for judgment of acquittal.

II. THERE WAS NO ERROR IN THE ADMISSION INTO EVIDENCE OF PLAINTIFF'S EXHIBITS 47 AND 48.

Appellant's Specification of Error No. 4 relates to the admission into evidence of plaintiff's exhibits 47 and 48. These exhibits are photostatic copies of the joint tax returns of appellant and his wife for the years 1943 and 1944. The photostatic copies of the exhibits were used in lieu of the originals because the original tax returns had been destroyed pursuant to a directive of the Internal Revenue Service dated July 19, 1949. The photostatic copies, however, were identified by a certification which indicated a policy to preserve photostatic copies of returns where a criminal or civil investigation had not been completed at the time said returns were to have been destroyed.

Appellant now raises no question with respect to the admissibility of the tax returns themselves or even to the use of photostatic copies; this specification of error relates exclusively to the nature of the certification attached to the photostats.

Just the converse was true at the time of trial. A general objection was made to the admission of the returns, but no objection was raised as to the nature of this certification or the language of it.

The objection with respect to the 1943 return was as follows: "Mr. Colvin: The first offer in this matter, I take it, is the tax return for the year 1943, bearing the name on the first line, 'Raymond and Lucille Kasper.' To that we object on the ground that the evidence is incompetent, irrelevant and immaterial." (R. 396-397.)

And as to the 1944 tax return the objection was: "Mr. Colvin: I make the objection, incompetent, irrelevant and immaterial." (R. 397.)

The form of the certification was not mentioned by counsel for appellant, nor was any objection made to it.

Quite clearly, if there had been any such objection, it would have been a simple matter to have removed the certifications from the returns and thus from observation by the jury. Appellant's counsel saw no reason for it at the time of trial. This question cannot be raised for the first time on appeal, since it could so easily have been corrected by a timely objection, with the grounds properly stated. *Duncan v. United States*, 68 F.2d 136, 9th Cir. 1933.

Nor was there any conceivable harm to appellant by reason of the language of the certification. The very fact that the criminal trial was in progress was an indication to the jury that it had been preceded by a criminal investigation. The certification added nothing to the case from which the jury could have drawn any inferences adverse to appellant.

III. THE INSTRUCTIONS OF THE COURT REGARDING CHARACTER EVIDENCE WERE SUFFICIENT.

Appellant's Specifications of Error Numbers 6 and 12 relate to the instruction given by the Court to the effect that character evidence "is to be considered by you along with all of the other evidence in the case in

determining the guilt or innocence of the defendant," (R. Vol. 9, pp. 11-12) and in failing to give defendant's Instruction No. 46 which was as follows:

"Relative to the testimony pertaining to the character of the defendant in respect to those traits of character which ordinarily would be involved in the commission of an offense like that charged in this case, I would instruct you as follows: Such evidence is regarded by the law as relevant to the question whether defendant is innocent or guilty of the crime charged, because the jury may, if its judgment so directs, reason that it is improbable that a person of good character in such respects would have conducted himself as alleged. Character evidence of itself may be sufficient to raise a reasonable doubt whether or not the defendant is guilty, which doubt otherwise would not exist. Hence, you must consider such evidence in connection with all other evidence in the case."

Appellant relies upon *Edgington v. United States*, 164 U.S. 361, as support for his contention that it is reversible error to fail to advise the jury that character evidence of itself may be sufficient to raise a reasonable doubt, which doubt might otherwise not exist. While it is true that substantially that language was used in the *Edgington* case, there was no suggestion that it was essential that such language be stated to the jury.

In the *Edgington* case the trial judge had instructed the jury that character evidence could be considered only if a reasonable doubt of the defendant's guilt had

been raised by the rest of the evidence. The Supreme Court held that the trial Court was in error, because evidence of good character, standing alone, might create a reasonable doubt even if the rest of the evidence created no doubt at all.

In the *Edgington* case the Supreme Court quoted with approval (at page 367) language used by the Supreme Court of Illinois in *Jupitz v. People*, 34 Ill. 516, where that Court, in holding that it was improper to limit the use of character testimony to a case where a jury had doubt of guilt and that evidence of good character was admissible in every case, went on to say "If the Court had told the jury that his good character should be taken into consideration by them, and was entitled to much weight, *a reasonable doubt of the prisoner's guilt might have been raised . . .*"

So then, it is only necessary that the evidence of good character be before the jury, so that such evidence be given the opportunity to raise a reasonable doubt. It is not necessary that this be spelled out to the jury. In commenting on the *Edgington* case, in *LeMore v. United States*, 253 Fed. 887 (5th Cir. 1918), it was said: "What the Court said . . . was said by way of argument and not to announce a rule of law to be given in the charge to the jury. We do not think the trial judge was required to charge the jury in the language quoted from the opinion." And in *Grace v. United States*, 4 F.2d 658, 662 (5th Cir. 1925), the Court said "to give the charge as drawn would unduly accentuate evidence of good character." See also *Kalmanson v. United States*, 287 Fed. 71 (2nd Cir. 1923);

Haffa v. United States, 36 F.2d 1, 5 (7th Cir. 1929); *Baugh v. United States*, 27 F.2d 257, 261 (9th Cir. 1928).

Appellant has cited *United States v. Wicoff*, 187 F.2d 886 (7th Cir. 1951). That case was almost identical with the *Edgington* case. The trial Court had instructed the jury "If there is doubt of the guilt of the defendant, character evidence may be considered." On the basis of the *Edgington* case this was held to be improper, but there was no suggestion that the language of the *Edgington* case had to be recited to the jury.

Appellant also cites *United States v. Donnelly*, 179 F.2d 227 (7th Cir. 1950). In that case the Court indicated the desirability of giving the instruction requested by appellant in this case but scrupulously avoided saying that the failure to give the instruction was error. It is quite clear that the conviction was not reversed by reason of the failure to give this instruction. The case was a very close one and a great many plain errors were involved and it was on the basis of all of them, taken together, that the Court determined that reversal was required.

The Court here fully instructed the jury on the question of reasonable doubt and made it clear to them that they must acquit if from all of the evidence, including the character testimony, they had a reasonable doubt of the guilt of the defendant. There are many elements in a tax evasion case. The Court is certainly not required to take these elements one by one, and to reiterate that a reasonable doubt of any

of them requires acquittal. A reasonable doubt may arise from one factor, or from all of the evidence. The defendant is entitled to an acquittal regardless of how it may have arisen. An instruction to the jury that if they have *any* reasonable doubt they must acquit, would seem to be sufficient. When the Court goes beyond that and advises them that in determining the guilt or innocence of the defendant they shall consider the character evidence along with all other evidence, it would seem that the rights of the defendant have been fully protected.

IV. THERE WAS NO ERROR IN THE COURT'S INSTRUCTION RESPECTING A SO-CALLED "GIFT" RECEIVED BY APPELLANT.

Appellant's Specification of Error No. 7 relates to an instruction advising the jury "if that enters into your consideration in the ultimate outcome of the case", then, with respect to a certain \$2,500 payment to appellant, they should determine if it were a gift, or a payment for services.

Appellant, in an effort to account for his net worth increase, had to face the fact that he at no time had reported sufficient income to account for the growth of his assets. Accordingly it was necessary for him to characterize certain moneys that he had received in the practice of medicine as something other than taxable income. He chose to represent that various gifts had been given to him by patients. The two largest gifts claimed were one received in Wahoo, Nebraska from a man long since dead and whose identity he re-

fused to reveal to the Internal Revenue Service during the period of their investigation, and one, in Fresno, from a man who had called the doctor to repair a young woman whom the man had mutilated with a broken bottle. Despite the fact that the mutilation was criminal, appellant failed to notify the police and some time after the incident he received a "gift" of \$2,500 from this individual. Appellant was unable to place the year in which this incident occurred but thought it was somewhere around the end of the war.

Apparently it could have occurred as late as 1947, but whether it did or not is not determinative. This gift was one of those gifts which appellant was attempting to use in order to account for the fact that his assets had increased although he had not reported sufficient taxable income to account for it. Accordingly, it was certainly proper for the jury to consider whether or not this truly was a gift, or whether it represented taxable income. If this supposed gift was in fact income, the jury could well doubt the nature of other "gifts."

It is to be noted that it was not the Court's instruction that brought this circumstance to the attention of the jury but rather the appellant himself. The testimony concerning appellant's action in this incident all came from appellant's pre-trial statement (Pl. Ex. No. 53) and from his testimony on the witness stand. The prejudice, if any, arose with appellant, and from evidence appellant concedes was admissible. No further harm was done appellant by the

instruction. It simply advised the jury that they could use this incident to determine the appellant's credibility when he characterized certain payments received from patients as gifts. There was no suggestion that this "gift" was contended by the Government to represent a specific item of unreported income in the tax years covered by the indictment.

What is more, the instruction served the purpose of advising the jury that they should consider this incident only for its financial aspects, and not as an indication of other improper conduct by appellant. Essentially, it was an instruction for the benefit of appellant, and one which in any event, did him no harm.

V. THE COURT'S INSTRUCTIONS ON THE "NET WORTH" METHOD OF PROOF WERE LUCID, COMPLETE AND PROPER.

A. The Instruction Given.

Appellant's Specification of Error No. 8 relates to an instruction given by the Court in which certain of the contentions of the parties were summarized. The instruction complained of is set forth at pages 8-10, Appellant's Opening Brief.

Appellant claims the instruction was prejudicial error because the trial Court advised the jury to 'resolve the truth' out of the conflicting contentions.

The part of the instruction complained of did not purport to state all of the elements of the offense, nor all of the contentions of the parties. The purpose of

the instruction was to explain to the jury the significance of the disputed cash accumulation and to advise that "in appraising and weighing the evidence in that regard, you should consider all the facts and circumstances, all the testimony and the documents disclosed in the record." (R. Vol. 9, p. 20.)

This is nothing like the instruction criticized in *Bihn v. United States*, 328 U.S. 633. There the trial Court asked the jury, in effect, "If the defendant did not steal the coupons, who did?" Of course that was improper. That was not the question. The only question was whether the defendant was guilty. But here, it was necessary that the jury 'resolve the truth' out of the respective claims of the parties as to the cash hoard. If appellant had the \$40,000 he claimed, he could not be guilty, since he would have accounted for a large part of the net worth increase.

True, if he did *not* have the hoard, it did not necessarily follow that he *was* guilty. Nor did the Court indicate to the contrary in any way. It was merely stated that "the evidence as to these cash accumulations requires your appraisalment." The Court was careful to point out,

"I call your attention to this particular phase of the case, not because I am emphasizing it, but merely by way of illustration. You should apply, in my opinion, the same method of analyzing and weighing the evidence with respect to all the other evidence in the case that has anything to do with the taxable income of the defendant, in order that you may resolve the truth."

From the instructions, read as a whole, it was clear that if, in "resolving the truth" of the issues of the case, there was a reasonable doubt of guilt, there should be an acquittal, and only if there was no such doubt, there should be a conviction. The jury had no such doubt, nor does the record indicate how any such doubt could have arisen.

But, appellant contends, the instruction was erroneous in a second respect, in that it eliminated his defense that his earnings were just what he reported.

There is no merit in this contention. The Court, as was said above, made it clear that the consideration of the jury was to be directed to all of the evidence in the case, and that the particular phase of the case was called to the jury's attention "not because I am emphasizing it, but merely by way of illustration." So neither by implication nor by direction could the jury possibly have thought that they were to base their judgment solely upon this issue.

B. The Instructions Refused.

Nor was it necessary that appellant's requested Instructions 27, 30 and 43 (which form the basis of Specification of Errors Nos. 9, 10 and 11) should have been given.

Instruction No. 27 was to the effect that the jury could not assume that the net worth increase represented taxable income, but that the prosecution had the burden of proving that there was unreported taxable income in the years covered by the indictment.

This was fully covered by the instructions given, and the Court pointed out, "The mere possession of money alone is not sufficient to establish that that represents taxable income." (R. Vol. 9, p. 19.)

Instruction 30 was to the effect that the prosecution must prove, beyond a reasonable doubt, that appellant wilfully evaded taxes by understating his income, and that "*the amounts of any monies or property that the defendant received, held or expended during the calendar years in question, on which figures the prosecution's case depends, are taxable income,*" and went on to say "If the evidence in this case leaves a reasonable doubt in your mind as to whether *any difference between the reported figures, and those alleged or depended upon by the prosecution,* were the result of monies or property accumulated in prior years, or were the results of gifts, or a combination of the two," then the jury must acquit.

This instruction would have been completely inaccurate. It certainly was no part of the Government's case, nor could it have been, that all the moneys expended or properties acquired in the years 1947 and 1948 were from taxable income of those years. The Government's computations recognized that some assets had been acquired by the conversion of funds previously held, some from money borrowed, etc. The case for the Government did not depend upon proof that any specific asset derived from unreported income, but rather that the growth in assets, the net worth increase, taken as a whole, led inescapably to

the conclusion that there had been income unreported in the years of 1947 and 1948.

Requested Instruction 43 was to the effect that there could be no conviction merely because the jury thought there had been a wilful tax evasion in *some* year, but only if they were convinced, beyond a reasonable doubt, that there had been wilful evasions in the years charged in the indictment. The Court told the jury exactly that. After stating the charges against appellant in clear and simple terms (R. Vol. 9, pp. 13-14), the Court went on to charge that it was necessary that there be proved "that a tax was due and owing the United States in addition to that declared by the defendant in his income tax return and the income tax return of his wife for each of the years in question. And, further, that the defendant by so filing such a return wilfully attempted to evade and defeat the tax". (R. Vol. 9, p. 14.) And again, "The word 'attempt' contemplates that the defendant had knowledge and understanding during each of the tax years 1947 and 1948 that he had an income which was taxable and which he was required by law to report, and that he attempted to evade and defeat the tax thereon . . . by purposely failing to report all the income which he knew he had during such calendar years, and which he knew it was his duty to state in his return for such years." (R. Vol. 9, p. 15.)

The jury could not possibly have doubted that the tax evasion as to which they were required to find was the evasion during the period charged in the indictment.

Appellant suggests that these instructions “would have pinpointed for the jury, the proposition that the jury could not assume that mere proof of net worth increases in the years charged in the indictment represented taxable income in those years, but the Government had to prove that fact . . . beyond a reasonable doubt and for those specific years.” (Ap. Op. Br. p. 36.) Since the Court had spelled out just exactly this, it is difficult to understand the basis for appellant’s contentions here.

VI. APPELLANT SUFFERED NO HARM FROM THE FORM OF THE QUESTION ASKED OF A CHARACTER WITNESS.

Appellant’s Specification of Error No. 13 relates to a question asked on cross-examination of a witness who had testified to his opinion of appellant’s character. This witness was asked “Did you know or have you heard” that appellant had once been fired from a job for dishonesty.

That the question was improperly phrased is clear. The words ‘did you know’ should not have been included.

Appellant’s claim of error is based only upon this misphrasing. He now concedes that if the question had been ‘Have you heard’, etc., there would have been no error. *Michelson v. United States*, 335 U.S. 469; *Stewart v. United States*, 104 F.2d 234, C.A. D.C. 1939. At the trial, the objection was not made to the form of the question, or on the ground that the question assumed a fact not in evidence (the only proper

basis for objection). The objection, instead, was on the general grounds "incompetent, irrelevant and immaterial." (R. 839.) Even when the Court overruled the objection on the ground that the Court assumed that the question "is asked in good faith by the Government"* , no further grounds of objection were stated. (R. 839.)

But even if a sufficient objection had been timely made, it is difficult to conceive how these three little words, "did you know", could have prejudiced appellant in any way. The question, if properly phrased, would have carried the same import, and sought out substantially the same information. If a proper objection had been made, the question could have been reframed, and its effect would have been just the same.

Nor is it material that the witness answered that he 'knew' appellant had been discharged. It was clear his knowledge of it could only have come secondhand, from the employer who discharged appellant (R. 838) or from appellant or elsewhere.

The inadvertent use of the three words 'Did you know' certainly does not rise to the level of misconduct by the prosecution; the Court ruled properly on the general objection made; and no harm to appellant can be demonstrated from the use of these three words. This Specification of Error is without merit.

*The Government filed with the Court the affidavit of Government counsel, Robert H. Schnacke, to the effect that he had positive evidence that appellant had been discharged under the circumstances set forth in the question. Appellant's motion to strike this affidavit was denied. (R. Vol. 1, p. 60.)

CONCLUSION.

The evidence in this case was overwhelming. Appellant was caught in a web of false statements, misstatements and evasions. The case was fairly tried, the jury was instructed correctly, impartially and comprehensively. The verdict of the jury was the only one that could reasonably have been expected. The conviction of appellant should be affirmed.

Dated, San Francisco, California,
March 14, 1955.

Respectfully submitted,

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No. 14,492

IN THE

**United States Court of Appeals
For the Ninth Circuit**

RAYMOND J. KASPER,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**On Appeal from the United States District Court
for the Northern District of California.**

APPELLANT'S REPLY BRIEF.

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FILED

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Appellee.

On Appeal from the United States District Court
for the Northern District of California.

APPELLANT'S REPLY BRIEF.

I. THE TESTIMONY OF MRS. HAVELL, APPELLANT'S AUNT,
DOES NOT CONTRADICT APPELLANT'S TESTIMONY AS TO
THE GIFT OF \$12,000.00 FROM HIS MOTHER.

Preliminarily, it is necessary to correct an erroneous
conclusion drawn by appellee from the record.

At page 3 of its brief, appellee says that appellant's
aunt, Mrs. Havell, called as a witness for appellant,
refuted appellant's testimony that his mother had
given him \$12,000.00 in order to equalize a gift of
three houses by the mother to appellant's sister. Mrs.
Havell's testimony shows that on appellant's mother's

death, there were five houses in her estate; three went to the mother's husband, one to appellant, and one to appellant's sister. However, upon the death of the husband the three houses he inherited were to go and did go to appellant's sister. (R. Vol. 5, 603-604.) Thus, in effect appellant's sister did receive four houses to appellant's one.

II. IN PROVING A NET WORTH CASE, THE APPELLEE HAD THE BURDEN OF PROVING THAT APPELLANT HAD A "LIKELY SOURCE" OF TAXABLE INCOME FOR THE TAX YEARS IN QUESTION FROM WHICH THE JURY COULD HAVE INFERRED THAT APPELLANT'S NET WORTH INCREASES WERE DERIVED.

Appellee states: "It is, of course, true that, in establishing unreported income by the net worth method, the Government has the obligation to establish that the taxpayer is in an income producing business from which income could be derived". (Appellee's Brief p. 8.) Appellee concedes only the obvious, namely, that before you can convict a man for income tax invasion you must show that he was receiving income. Appellee completely disregards the opinion of the Supreme Court in *Holland v. United States*, 348 US 121, 99 L. Ed. Adv. Reports 127, wherein it was pointed out that the Government sustained the burden of proving not only the defendant's net worth increase for the year in question, but also prove that defendant's business was capable of producing income for the tax year in question sufficient to account for the increase in net worth. It is worth

noting that the Government proved that the defendant reported as income from his business in 1946 only 12½% of what the prior owner had reported from the same business in 1945. In 1947 the ratio was 12% and in 1948, the year in question, it was 26%. Further, the Government introduced evidence to show that Holland's business in 1948 had increased over what the prior owner had shown in 1945. As the Court said in the *Holland* case,

“the net worth increase claimed by the Government could have come entirely from the unreported income of the hotel and still the hotel's total earnings for the year would have been only 73% of the sum reported by the previous owner for the comparable period in 1945”.

348 US 121, 137, 99 L. Ed. Adv. Reports 127, 138.

In the instant case, the appellee's own calculations disprove appellee's contention that appellant's medical practice was a “likely source”, in the language of the *Holland* case, of appellant's net worth increases in 1947 and 1948. Appellee's Exhibit 54 (Appendix A, Appellant's Opening Brief) shows that the appellee calculated appellant's taxable income in 1946 to be \$6802.74, yet appellee claims that the same source of income yielded \$36,931.22 in 1947 without any evidence in the record to show that appellant's medical practice had increased over what it was in 1946. In this context it is important to observe that the Government introduced no evidence aside from its net worth inferences in contradiction of the appellant's

own computations of his earnings in the tax years in question.

Appellee contends that "Appellant himself narrowed the issue by his pre-trial statements and by testimony at the trial to the contention that the expenditures made during the years 1947 and 1948 were made from some \$40,000.00 he had saved in Wahoo, Nebraska, and brought to Fresno, and which was still on hand at the beginning of 1947. The impossibility of this was adequately demonstrated by evidence." (Appellee's Brief p. 10.) Appellee then cites *Friedberg v. United States*, 348 US 142, 99 L. Ed. Adv. Reports 140, in support thereof.

The difference between the *Friedberg* case and the case at bar is this: In the *Friedberg* case, Friedberg "stipulated virtually every other net worth issue out of the case" (348 US 142, 143, 99 L. Ed. Adv. Report 140-141) leaving solely the question of whether Friedberg had \$60,000.00 cash on hand to be included in the opening net worth statement prepared by the Government. In the case at bar, despite appellee's statement quoted above, appellant has stipulated to nothing insofar as the elements of the Government's proof of a net worth case are concerned. It is true that at trial it was a part of appellant's defense that he had a cash accumulation of \$40,000.00 which he had brought with him from Nebraska. However, even if the jury disbelieved the appellant, that would not relieve the Government of its burden of proving that appellant's net worth increases in 1947 and 1948 arose from taxable income received in those years. Interestingly,

enough, appellee in its brief makes the same error that we allege the trial court made in instructing the jury, namely, that the issue in the case was whether appellant had \$40,000.00 in cash in his possession when he arrived in Fresno, California in 1942.

III. THE INSTRUCTION REGARDING CHARACTER EVIDENCE WAS INSUFFICIENT AND IT WAS ERROR TO REFUSE APPELLANT'S INSTRUCTION.

Appellee concedes that "evidence of good character, standing alone, might create a reasonable doubt even if the rest of the evidence created no doubt at all". (Appellee's Brief p. 15.) However, appellee says, while the foregoing is a correct statement of the law, a defendant who calls character witnesses on his behalf is not entitled to an instruction announcing that proposition of law even though he requests such an instruction. At page 15 of its brief appellee quotes from *Edgington v. United States*, 164 US 361, 41 L. Ed. 467, and then appellee says: "So, then, it is only necessary that the evidence of good character be before the jury, so that such evidence be given an opportunity to raise a reasonable doubt. It is not necessary that this be spelled out to the jury". This is as striking an illustration of a non sequitur as may be found in any elementary text book on logic. The language from the *Edgington* case, cited by appellee, plainly begins "If the Court had told the jury". How does a Court tell a jury except by its instructions to the jury? Yet counsel for appellee cites this

language for the proposition that the Court does *not* have to tell the jury about the significance of character testimony.

We do not argue that an instruction on character testimony must embody the language of the *Edgington* case *in haec verba*. But the instruction, if requested, should contain the essence of the holding in that case.

Sunderland v. United States, 19 Fed 2d 202;

United States v. Quick, 128 Fed 2d 832.

Does the charge as given by the trial Court in the case at bar meet that test? The full text of the Court's instruction on character witnesses is as follows:

"You may consider in connection with this case the testimony of the so-called character witnesses which have been given and the witnesses who have testified as to the character of the defendant for truth, honesty and integrity in the community in which he lives. That evidence is to be considered by you along with all of the other evidence in the case in determining the guilt or innocence of the defendant."

Note, first, the characterization employed by the Court: "so-called character witnesses". Surely, the word "so-called" tended to discredit in the mind of the jury this type of evidence.

Secondly, the charging portion of the instruction gave no indication to the jury that, in the light of all the evidence, character testimony of itself might generate a reasonable doubt as to the guilt of appellant and yet it is agreed that such is the law.

Appellee cites *Grace v. United States*, 4 Fed 2d 658, 662, apparently for the proposition that to charge a jury directly that the good character of the defendant, taken with other evidence, might create a reasonable doubt would unduly accentuate evidence of good character. But in that case the Appellate Court said that the trial Court had "charged fully on the effect to be given testimony of good character and took occasion to say: 'This testimony may be considered in defendant's favor to the extent of a reasonable doubt' ". (4 Fed 2d at p. 662.) In effect, then, it would appear that the trial Court in the *Grace* case had given the substance of the Edgington rule of law.

In *Baugh v. United States*, 27 F. 2d 257, 261, relied on by appellee, the trial Court instructed as follows:

"If you believe from the testimony that prior to the time of the alleged offense for which the defendants are now on trial, they bore a good reputation in the community where they resided for honesty and integrity, that is a circumstance in their favor which you will consider, together with all the facts and circumstances in evidence. It is competent testimony, and you should take it and consider it and give it such weight as appeals to your judgment."

The court on appeal held the instruction adequate. But the instruction in the *Baugh* case goes beyond the instruction given in the case at bar. At least the jury was instructed that character testimony was evidence in favor of the defendant and that the jury should

give it such weight as appealed to their judgment. Even this was not done here. In *Kalmanson v. United States*, 287 Fed. 71, 72, also cited by appellee, the trial court instructed:

“You have a right to consider the good character of the defendant, if you find it is good, in making up your mind about the guilt or innocence of the defendant * * * The court charges you that if you do find the defendant has a good character, you have a right to consider that fact as a circumstance in this case, as to whether a man of good character would commit this kind—or any offense.”

Here too, the charge as given and sustained on appeal goes beyond the charge given in the instant case and so, too, in *Haffa v. United States*, 36 Fed. 2d 1 also cited by appellee.

In conclusion, we say that while it is true that the Appellate Courts have refused to find reversible error where trial Courts have failed or refused to give instruction which overemphasized or unduly accentuated the significance of character testimony, such refusal does not obviate the necessity of an adequate charge within the meaning of the *Edgington* case. The charge was not adequate by that standard for it failed to set forth

“the purpose and function of character evidence i.e. to generate reasonable doubt; the probative status of such evidence, i.e. that it be considered by the jury regardless of whether the other evidence in the case is clear or doubtful, and the possible effect of character evidence, i.e. that, whe

considered along with the other evidence in the case, if a reasonable doubt exists as to the defendant's guilt, he is entitled to an acquittal."

Sunderland v. United States, 19 Fed. 2d 202, 215.

IV. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN ITS INSTRUCTION RESPECTING A "GIFT" OF \$2500.00.

Appellee misunderstands the meaning of his own case in his discussion of the \$2500.00 gift relative to whether it was a gift or income. For the interesting aspect is this: Appellee neither at the trial nor here argued that the money had not been received; its argument is that the money was taxable income and not a gift. However, the evidence shows that the \$2500.00 as well as the other large gift mentioned in appellee's brief was received by appellant prior to 1947, the first year charged in the indictment. The only significance these monies can have then is in their effect upon appellant's opening net worth, i.e. his net worth as of January 1, 1947 and from that standpoint, *whether the money was received as a gift or as taxable income was immaterial*. All that was material was whether he had received it.

The only situation in which the distinction between gift and income would have become significant in this case would have been the situation where the evidence showed receipt of money from patients during the tax years charged in the indictment which the appellant labeled "gifts" and did not report as taxable in-

come but which a jury might have considered income. But the record is devoid of any evidence to show the receipt of such gifts in 1947 or 1948. In fact, such evidence as there is in the record plainly indicates that appellant received no gifts in 1947 or 1948. (R. Vol. 8, page 909.)

Therefore, as we stated in our opening brief, the Court's instruction raised an issue for the jury where as a matter of law, none existed. It directed the jury's attention to an irrelevant transaction or event which reflected or might have tended to reflect adversely on the character of the appellant. Finally, the jury was told that it might consider in arriving at its verdict a fact question totally immaterial to the indictment on which appellant was tried.

V. THE COURT'S INSTRUCTIONS ON THE "NET WORTH" METHOD OF PROOF WERE NOT "LUCID, COMPLETE AND PROPER".

Appellee blandly says that this case is different from *Bihn v. United States*, 328 US 633, 90 L. Ed. 1480, cited at pages 30-31 of Appellant's Opening Brief, but why it is different appellee does not make clear. The point in the *Bihn* case was that the trial Court, in its charge to the jury on a vital issue, cast its language in a form that omitted from the consideration of the jury, the issue of "reasonable doubt" and this was fatal even though the trial Court had instructed in general terms as to "reasonable doubt". In the instant case the trial Court instructed on a

essential issue, the issue of a cash accumulation, in terms of "resolving the truth" between the Government's contention and appellant's contention. But what if there were a reasonable doubt as to where the truth lie in this regard? The Court should have gone on to instruct the jury that in such eventuality it had to acquit. The failure to so instruct was not corrected by the general instructions that the Court gave as to "reasonable doubt", as the Supreme Court pointed out in the *Bihn* case.

Appellee answers our argument that the Court's instructions as set forth in pages 8-10 of our Opening Brief, foreclosed from the jury appellant's defense that the evidence of his earnings during the tax years in question supported the tax returns for those years, by saying that the instruction was intended as an "illustration". True, the Court did, at the conclusion of its remarks, say it was discussing the matter of the cash accumulation "not because I am emphasizing it, but merely by way of illustration". But the Court also said to the jury at the beginning of its remarks on the cash accumulation "you have to determine how you weigh the evidence as to these cash accumulations, *which are, in my judgment, the determining factor in arriving at a decision in this case* on the part of the jury".

Finally, appellee argues that from the instructions as a whole the jury could not have possibly doubted that the tax evasion as to which they were required to find was the evasion during the period charged in the indictment.

While a tax attorney might not have been confused by the Court's charge, the instructions were inherently confusing to a lay jury.

Consider, first, the Court's instruction as to the gift of \$2500.00 previously discussed. Since the "gift" occurred prior to 1947, the fact that the jury was told that the question of whether the cash was a gift or income might enter into their decision could only confuse the jury as to what appellant was being tried for. Was he being tried for receiving income prior to 1947 which appellant had characterized as "gifts" and not reported as taxable income?

Then, the Court's instruction as to the \$40,000.00 cash accumulation gave the jury the impression that if appellant did not have the \$40,000.00 on January 1, 1947, he was automatically guilty of income tax evasion in 1947 and 1948 regardless of what his income might have been in 1947 and 1948.

Surely, as we said in our Opening Brief, where charges should be especially clear, appellant was entitled to have his requested instructions Nos. 30 and 41 given, or at least the substance of those instructions should have been given.

71. THERE WAS PREJUDICIAL ERROR IN THE FORM OF THE QUESTIONS ASKED A CHARACTER WITNESS, ON CROSS-EXAMINATION, PARTICULARLY WHERE NO PRECAUTIONARY INSTRUCTION WAS GIVEN BY THE COURT.

Appellee suggests that "it is difficult to conceive how these "three little words 'did you know' could have prejudiced appellant in any way" (Appellee's Brief p. 23.) Of course, it isn't the "three little words" that prejudiced the appellant; it was the implied statement of fact that appellant had been discharged for dishonesty that constituted prejudicial error.

In *United States v. Phillips*, 217 Fed 2d 435, a criminal prosecution for income tax evasion, the Government on cross-examination, asked one of appellant's character witnesses whether he had heard that appellant had been arrested for issuing checks to defraud. The Court held that even though the question had been couched in the form "did you hear" it was prejudicial error where (1) The record was devoid of any showing that appellant had, in fact, been arrested and (2) no precautionary instruction was given to the jury as to the purpose of this cross-examination even though appellant had not requested such an instruction.

In the instant case, there was no evidence in the record that appellant was discharged for dishonesty and certainly no precautionary instruction of any kind was given to the jury as to the limited purpose of such cross-examination. (Contrast *Michelson v. United States*, 335 US 569, 93 L. Ed. 168.)

To assert as appellee does, that the error committed by appellee was "inadvertent" does not in any way lessen the prejudicial effect of the error upon the jury, nor is an affidavit filed by the Government after the verdict was returned of any material significance.

As the Court said in *United States v. Phillips*, 217 Fed. 2d at page 444,

"For aught that is disclosed by the record, the jury was at liberty to consider the damaging implication inherent in the Government's cross-examination for any and all purposes".

This is doubly applicable where the form of the question asked, "Did you know or have you heard", is not even within the scope of *Michelson v. United States*, supra.

Dated, San Francisco, California,

April 8, 1955.

Respectfully submitted,

DAVIS & COLVIN,

REYNOLD H. COLVIN,

SIDNEY FEINBERG,

Attorneys for Appellant.

NO. 14494

In the
United States
Court of Appeals
for the Ninth Circuit

BARTOLOMEO MONGE,

Appellant,

VS.

JAMES G. SMYTH, Collector of Internal Revenue
for the First District of California,

Appellee.

Brief for Appellant

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

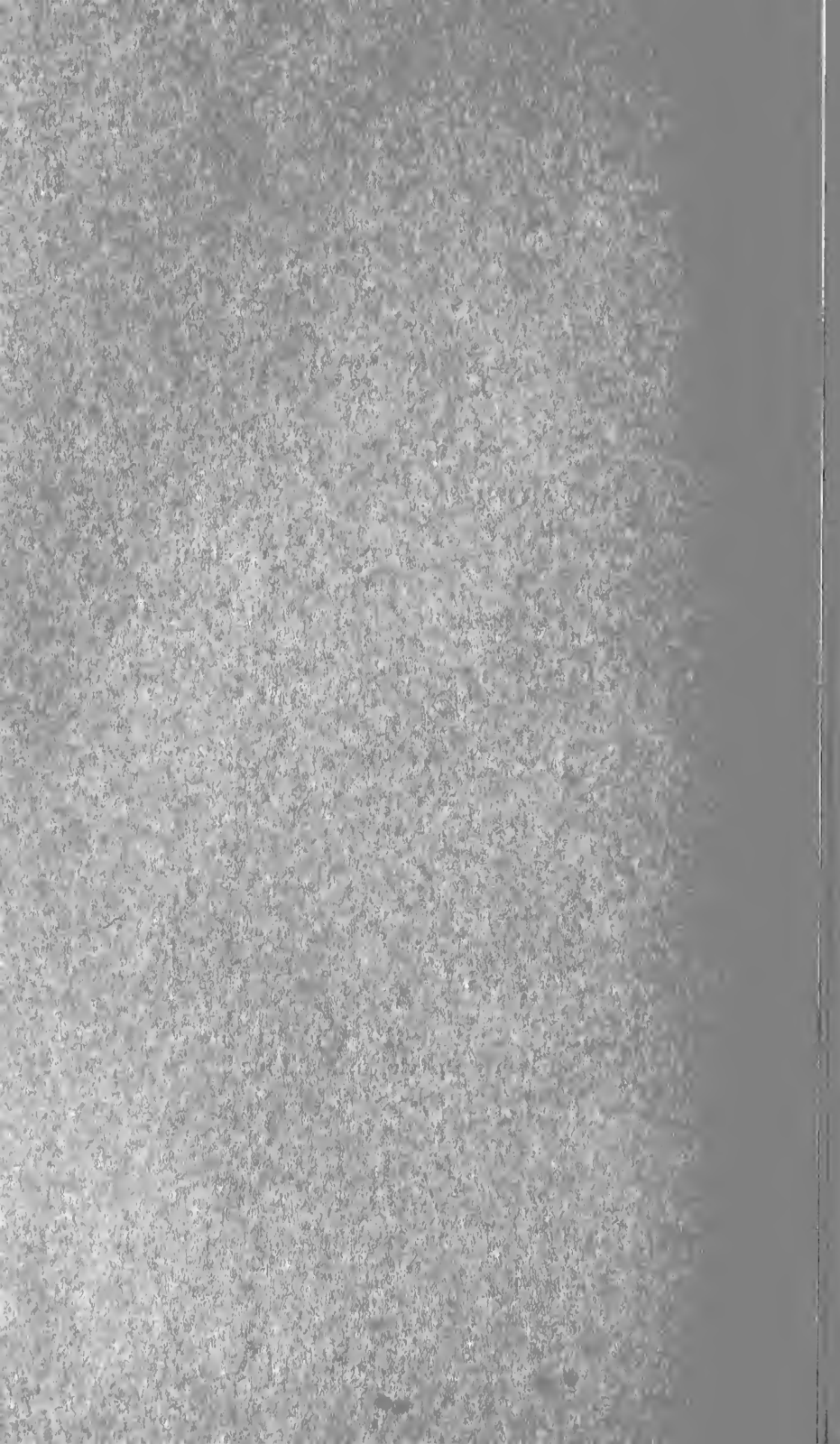
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NO. 14494

In the
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for the Ninth Circuit

BARTOLOMEO MONGE,

Appellant,

vs.

JAMES G. SMYTH, Collector of Internal Revenue
for the First District of California,

Appellee.

Brief for Appellant

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Wareham C. Seaman
SEAMAN & DICK
Attorney for Appellant

OPINION BELOW

The opinion of the United States District Court for the Northern District of California, Southern Division, is unreported, but a memorandum decision dismissing the original complaint is found in the transcript, page 25; an order dismissing the first amended complaint with leave to amend, (Tr. page 34), and an order of dismissal of the second amended complaint and of the entire action is found in the transcript, page 48.

JURISDICTIONAL STATEMENT

This appeal involves an injunction and rescission sought by the appellant pursuant to Sections 272(a) and 273(b), 1939 Internal Revenue Code, and jurisdiction was conferred on the court below under 28 U.S.C.A., Section 1340. Jurisdiction is conferred on this court by 28 U.S.C., Section 1291.

QUESTIONS PRESENTED

1. Whether appellant was entitled to an injunction because of the arbitrary and oppressive conduct of the defendant.
2. Whether a jeopardy assessment was made by the defendant against the appellant under Section 273(a), 1939 I.R.C., and, if so, whether the assessment was invalid.
3. Whether, under the rule of this court, defendant was required to issue a statutory notice under Section 272(a), 1939 I.R.C., and, on the failure to do so, the assessment was invalid, entitling the appellant to an injunction or rescission.

STATEMENT OF THE CASE

The original complaint, seeking an injunction on the ground of the arbitrary and oppressive conduct of the defendant, was filed on June 29, 1951 (Tr. page 3). Annexed thereto was an affidavit by appellant (Tr. page 7) and an affidavit by the attorney for appellant (Tr. page 15). A motion to dismiss by the defendant (Tr. page 20) was granted by the Court below which, in its opinion (Tr. page 25) found that there was not a showing of sufficient arbitrary and oppressive conduct to justify removal of the injunction from the prohibition of Section 3653(a), 1939 I.R.C. Prior to the dismissal of the original complaint, appellant filed a first amended complaint (Tr. page 21) on September 28, 1951, on the ground that the defendant had issued a jeopardy assessment pursuant to Section 273(a), 1939 I.R.C. which was invalid because of the failure to issue the statutory notice required under subsection (b) of the same section. The defendant's motion for summary judgment (Tr. page 27) was denied by the Court (Tr. page 31) on November 13, 1951. The answer of defendant to the first amended complaint (Tr. page 29) thereupon was filed on November 21, 1951.

Appellant filed an appeal before this court on the dismissal of the original complaint and denial of a request for rehearing, which appeal this Court, on September 3, 1952, found premature and ordered dismissed without prejudice (Tr. page 31). On

March 11, 1953, defendant filed a motion to dismiss the action and for summary judgment on the second amended complaint (Tr. page 33). On September 29, 1953, the Court below, in its memorandum and order (Tr. page 34) denied such motion on the action but did dismiss the amended complaint with leave to amend, because it felt that the complaint could be amended to remedy a deficiency in allegation; and the Court also vacated the restraining order against defendant which had theretofore been in force.

On October 20, 1953, Appellant filed a second amended complaint (Tr. page 36) restating the grounds of the original complaint and the first amended complaint and in such a form as to challenge the validity of the Waiver form 870-TS, upon which the assessment by defendant was based. Attached thereto was an affidavit by appellant (Tr. page 43). This second amended complaint as well as the action was dismissed by the Court (Tr. page 48) on June 30, 1954. A timely appeal was filed by appellant on July 21, 1954.

FACTS OF THE CASE

There has been no testimony taken by the Court below and no stipulation of facts. The only information available to the Court was that contained in the affidavits of appellant (Tr. page 7, 23 and 43) the affidavit of the attorney for appellant (Tr. page 15) and the appearances before the Court in

its hearings as noted above. The affidavits (Tr. pages 7, 15 and 23) most completely set forth the facts upon which appellant relies.

SPECIFICATION OF ERROR RELIED UPON

1. That the Court below erred in failing to find that the knowledge and conduct of the defendant was sufficiently arbitrary and oppressive to justify an injunction, notwithstanding Section 3653(a), 1939 I.R.C.

2. That the Court below should have permitted a hearing to determine whether the assessment against appellant was a jeopardy assessment under Section 273(a), 1939 I.R.C., and, if so, it should have found that the assessment was invalid under Section 273(b), 1939 I.R.C.

3. That the Court below erred in not following the rule of this Court that the Waiver form 870-TS, as provided in Section 272(d), 1939 I.R.C. is invalid without a determination and statutory notice issued by the defendant as provided in Section 272(a), 1939 I.R.C.

STATUTES INVOLVED

INTERNAL REVENUE CODE of 1939.

SECTION 272. PROCEDURE IN GENERAL.

(a) (1) *Petition to The Tax Court of the United States.*

If in the case of any taxpayer, the Commissioner determines that there is a deficiency in

respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

(d) *Waiver of Restrictions.*

The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

SECTION 273. JEOPARDY ASSESSMENTS

(a) *Authority for Making.*

If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest,

additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency Letters.*

If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

SUMMARY OF ARGUMENT

I.

The affidavits set forth sufficient allegations to justify a finding that the action of defendant in making the assessment and levying against appellant was arbitrary and oppressive.

II.

The defendant's assessment against appellant was a jeopardy assessment, pursuant to Section 273(a), 1939 I.R.C., and was invalid because of his failure to issue a statutory notice as required by Section 273(b), 1939 I.R.C.

III.

The assessment made by defendant was invalid under the rule of this Court because there was no determination before signing nor was there issuance of the statutory notice by defendant.

ARGUMENT

I.

The affidavits set forth sufficient allegations to justify a finding that the action of defendant in making the assessment and levying against appellant was arbitrary and oppressive.

Without restating the affidavits, they clearly indicate that appellant was an old, uneducated and very ill man, who was induced to rely upon a person whose interest was completely adverse to his own, so far as proper determination of any tax liability, if any, could be made and that these facts were known to defendant. While appellant in no wise contends that defendant is charged with determining the good faith of representatives of taxpayers, appellant does respectfully submit that defendant cannot close its eyes to such a clear abuse in taxpayer's representation in the determination of any tax liability. At no time was appellant permitted to introduce evidence that his representation before defendant was unconscionable, and that defendant at all times was aware of this. That there was at least some semblance of equity in appellant's position is indicated, first, by the restraining orders issued by the Courts below and, more particularly, by the statement of the Court (Tr. page 53) in one of the hearings. More precisely, the statement of the Court (Tr. page 53) that "Someone is being stubborn about it on the part of the Government . . ." clearly sets forth the equitable issue.

At no time has the defendant been willing to discuss this case administratively, as set forth in Transcript page 15, which was admitted by the defendant (Tr. page 53) and, in fact, the defendant reneged on a promised review of the matter (Tr. page 18) and further refused to review the matter even after the suggestion and request of one of its local officers (Tr. page 19) for administrative review was carried to the Commissioner of Internal Revenue and was refused prior to filing of the initial complaint (Tr. page 19).

The allegations show that the Appellant was a very ill man from an operation for cancer; that he has no means of support; that his only worldly goods either had been seized or liened against by defendant, making precarious his operation of the ranch to sustain himself, and for medical treatment, and that he would suffer irreparable loss from the action of the defendant.

II.

The defendant's assessment against appellant was a jeopardy assessment pursuant to Section 273(a), 1939 Internal Revenue Code, and was invalid because of his failure to issue a statutory notice as required by Section 273(b), 1939 Internal Revenue Code.

Assuming, arguendo, that the defendant could have issued the assessment based on the Waiver form 870-TS, as provided in Section 272(d), 1939 I.R.C., the affidavits allege that, in fact, the assessment was made under Section 273(a), 1939 I.R.C., which pro-

vides for the making of a jeopardy assessment. Subsection (b) of that section provides that in such an assessment, the statutory notice must be issued. Whether or not the assessment was a jeopardy assessment is principally a question of fact, which was clearly recognized by the Court below in its statement in the hearing disposing of defendant's motion for summary judgment (Tr. page 52). Appellant was prepared to introduce evidence that the time element between the issuing of the assessment and the making of the lien was contrary to the administrative practice of defendant on assessments made pursuant to Section 272(a), 1939 I.R.C., and clearly substantiated the making of a jeopardy assessment under Section 273(a), 1939 I.R.C. That defendant did not issue the statutory notice provided in either Section 272(a) or Section 273(b), 1939 I.R.C., is stipulated (Tr. page 52). The issuance of the statutory notice is of extreme importance to the appellant, because only then will jurisdiction be conferred on the Tax Court of the United States, so that taxpayer's liability to defendant, if any, and which appellant denies, would be judicially determined.

It is ironic that defendant so strenuously resists any judicial determination, while at the same time it would suffer no impairment, in any respect, of the statute of limitation or full recovery of the tax, if any, that might be due defendant.

Defendant has contended that the assessment, even if invalid as a jeopardy assessment, would have been valid based on the Waiver form 870-TS. Appel-

lant respectfully submits that it is not what could have been done but what actually was done that governs.

III.

The assessment made by defendant was invalid under the rule of this court, because there was no determination before signing nor was there issuance of the statutory notice by defendant.

This Court has held, in *Mutual Lumber Co. v. Poe*, 66 Fed. 2d 904; *McCarthy Co. v. Commissioner*, 80 Fed 2d 618, that waivers under Section 272(d), 1939 I.R.C., which is the statutory authority for the Waiver form 870-TS at issue, signed before the determination required under Section 272(a), 1939 I.R.C., were invalid and, more importantly, that such waivers did not deny a taxpayer the right to go to the Tax Court for which a statutory notice is jurisdictional. That such notice was not issued was stipulated by the defendant (Tr. page 52). That the determination was not made prior to the waivers dated November 2, 1949, is alleged in the affidavit (Tr. page 12) and is further evidenced by the photostatic copy of such waiver attached by defendant in its motion dated April 13, 1953, in support of its motion to dismiss that action, at the bottom of which is typed "This copy to be retained by Petitioner", indicating that appellant failed to receive his copy allegedly after insertion of the amounts. Regretably, this photostatic copy was omitted from the transcript but would be available as evidence.

The rule of this Circuit is contrary to that of the First Circuit in its case of *Associated Mutuals, Inc. v. Delaney*, 176 Fed. 2d 179, in which it held that this Court's reliance upon the law rather than administrative practice was in error. This case did, however, (as well as the decision by the Third Circuit in *Victory v. Manning*, 128 Fed 2d 415), hold that the validity of the waiver should be determined before disposing of the case on the ground of lack of jurisdiction under Section 3653(a), 1939 I.R.C.

This Court's position is well supported by the Senate Finance Committee Report, 69th Cong., First Sess., S. Rept. 52, which stated that the purpose of Section 272(d), 1939 I.R.C., which is the statutory provision for the Waiver form 870-TS at issue, is as follows:

“In order to permit the taxpayer to pay the tax and stop the running of interest, the Committee recommends in Section 274(d) of the bill, (272(d), 1939 Internal Revenue Code) that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax but without taking away the right of the taxpayer to take the case to the Board, (now the Tax Court).”

The language of this report and the Code provision indicates that this is an unilateral action by the taxpayer; and, while it waives the restrictions on assessment and collection, it does not waive the right to litigate the liability in the Tax Court.

It is noteworthy that the defendant took the position of the appellant in the McCarthy case, *supra*.

The rule adopted by this Court also is well set out in *East Bay Water Co. v. McLaughlin*, 24 F. Supp. 222. It is noteworthy that this Court's position is adopted in the 1954 Internal Revenue Code, sec. 6212(a), and section 6213, subsection (d) referring to subsection (a) only.

The attention of this Court respectfully is invited to the prayer for rescission, (Tr. page 6), of the Waiver form 870-TS, in addition to the prayer for injunction. It is respectfully submitted that rescission is not barred by Section 3653(a), 1939 Internal Revenue Code, and may properly be done upon the equities alleged in this action.

CONCLUSION

The action of the Courts below denied to the appellant the opportunity to adduce evidence that, in fact, a jeopardy assessment was made and that, in fact, the assessment was not validly made pursuant to the rule of this Court. Appellant, uneducated, aged, ill and infirm from a cancer operation, is threatened with complete destitution by the action of defendant. He was placed in this position by representation before defendant by one whose interests were completely inimical to that of appellant, knowledge of which by defendant appellant believes he can prove. Appellant was rebuffed by defendant in any administrative redress and sought this action as the only means of preventing irreparable loss. Administrative action of the defendant has denied to appellant his right to a judicial determination of

his tax liability, if any, because of the invalidity of the assessment made, so held under rule of this Court, or the invalidity of the assessment as a jeopardy assessment. A rescission of the waiver or an injunction against the defendant would not impair the rights of defendant to proceed pursuant to the provisions of the Internal Revenue Code and the rule laid down by this Court.

DATED at Stockton, California, this 24th day of February, 1955.

Respectfully submitted,

SEAMAN & DICK,

By Wareham Seaman

(Attorneys for Appellant.)

No. 14,494

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BARTOLOMEO MONGE,

Appellant,

VS.

JAMES G. SMYTH, former Collector of
Internal Revenue for the First District
of California, and GLEN T. JAMISON,
Director of Internal Revenue,

Appellees.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

BRIEF AND APPENDICES FOR APPELLEES.

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CHARLES ELMER COLLETT,

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Internal Revenue Service.

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No. 14,494

IN THE

**United States Court of Appeals
For the Ninth Circuit**

BARTOLOMEO MONGE,

Appellant,

vs.

JAMES G. SMYTH, former Collector of
Internal Revenue for the First District
of California, and GLEN T. JAMISON,
Director of Internal Revenue,

Appellees.

**Appeal from the United States District Court for the
Northern District of California,
Southern Division.**

BRIEF AND APPENDICES FOR APPELLEES.

OPINION BELOW.

The opinion filed by the District Court when it dismissed taxpayer's original complaint as first amended (R. 25-27)¹ is reported at 100 Fed. Supp. 821.² When

¹The reference R. is to materials found in the printed record on appeal.

²This proceeding is before this Court for the second time. This Court's opinion, dismissing without prejudice the prior appeal, is reported at 198 F. 2d 744.

the taxpayer's action after remand from this Court was finally dismissed by order of the District Court, the District Court did not write a subsequent opinion.

JURISDICTION.

This appeal involves an action to restrain the collection of Federal income taxes, penalties and interest assessed for the tax years 1942 to and including 1946. On November 2, 1949, taxpayer signed a waiver (Treasury Department Form 870 T. S.) of restrictions on assessment and collection of deficiencies in Federal income taxes, penalties and interest for the years 1942 to and including 1946.³ On July 5, 1951, this action was commenced by the filing of a complaint to enjoin the collection of the taxes, penalties and interest assessed pursuant to the waiver agreement. It was alleged that the suit arose under the provisions of 28 U. S. C., Section 1340. (R. 3-5.) On order of the District Court, this complaint was dismissed; a petition for rehearing was filed and denied on April 8, 1952. (R. 31-32.) Within the prescribed period taxpayer noticed an appeal to this Court. (R. 32.) On September 3, 1952, this Court ordered that the appeal be dismissed without prejudice. (R. 32.) On remand

³For the convenience of the Court and for the purpose of subsequent reference and discussion, the waiver form executed by taxpayer on November 2, 1949, and accepted and executed for the Commissioner by his authorized agents is printed in Appendix B of this brief. This document, printed in Appendix B, is part of the record certified to this Court by the District Court. Waiver form 870 T.S. is also reproduced in the opinion in *United States v. Goldstein*, 189 F. 2d 752 (C.A. 1st).

and after taxpayer filed a second amended complaint, the District Court, by order dated June 30, 1954, dismissed the action. (R. 48.) Within sixty days and on July 21, 1954, notice of appeal was filed. (R. 49.) The jurisdiction of this Court is invoked pursuant to the provision of 28 U. S. C., Section 1291.

QUESTION PRESENTED.

Whether the District Court correctly concluded that taxpayer's action to enjoin collection of federal taxes should be dismissed where his allegations failed to show the existence of extraordinary circumstances or statutory grounds which would remove the specific prohibition against suits to enjoin federal taxes framed by Section 3653(a) of the Internal Revenue Code of 1939?

STATUTES AND REGULATIONS INVOLVED.

These appear in Appendix B, *infra*.

STATEMENT.

The District Court did not make findings of fact and the parties did not file a stipulation of facts. The case was presented to the District Court on pleadings, affidavits, motions, petition and briefs in support of the motions and petition. The course of the proceedings, as reflected in the pleadings, motions and orders of the Court, is substantially as follows:

This action was commenced by the filing, on or about July 5, 1951, of a complaint for injunction, rescission of waiver of restriction on assessment and collection of deficiency in tax and other relief. (R. 3-6.)⁴ In this complaint taxpayer alleged that the Collector had distrained his real property and both his bank accounts; that the Collector's action was taken pursuant to an assessment, made on or about December 28, 1949, of income taxes, penalties and interest for the years 1942 to and including 1946 and that this assessment was made in accordance with a waiver of restrictions on assessments and collection of deficiency in tax executed by the taxpayer on November 2, 1949. (R. 3-4.)

With regard to this waiver, taxpayer's complaint alleged that he had executed it in reliance upon the advice of his attorney, Abraham Buchman, who, prior to the execution of the waiver, represented him in conferences with representatives of the Internal Revenue Service. It was further alleged that Abraham Buchman, at the same time that he represented taxpayer,

⁴Attached to this complaint, as Exhibits A and B, were affidavits of the taxpayer and his attorney, Wareham Seaman. (R. 7-9.) Taxpayer's affidavit concerns facts relative to the negotiations which resulted in compromising certain tax liabilities asserted against him and in his execution of a certain waiver of restrictions on the assessment and collection of the compromised tax liability. The affidavit of taxpayer's attorney concerns the nature and result of the attorney's dealings with the Internal Revenue Service with respect to administrative treatment of taxpayer's tax liability after the waiver of restrictions on assessment and collection had been executed by the taxpayer. Since these affidavits are not felt to be material to the issues here involved and since they do not readily lend themselves to summarization, this statement does not deal with the materials there set out.

was representing persons having an interest in taxpayer's tax liability adverse to the taxpayer; that such adverse interest was known to representatives of the Internal Revenue Service but was not known to taxpayer or disclosed to him by Buchman; that Buchman, for reasons adverse to taxpayer's interest, advised and induced taxpayer to execute the waiver. (R. 4-5.) Because of the execution of the waiver, the complaint alleges, income taxes greatly in excess of the correct tax liability were assessed and fraud penalties were added although taxpayer was not guilty of fraud; that taxpayer was deprived of administrative remedies otherwise available to him; that taxpayer's bank accounts and real property had been seized and as a result of this seizure of his property taxpayer was without sufficient funds to conduct his business or to defray his living and medical expenses. (R. 5.)

It was additionally alleged that taxpayer had exhausted the administrative remedies available to him; that he had no adequate remedy at law and that unless the Collector was restrained from selling his property or otherwise restrained from collecting the assessed taxes, and unless the property previously seized (funds in the bank accounts) was restored, taxpayer would suffer great and irreparable injury. (R. 5.)

In the wherefore clause taxpayer demanded (a) that the Collector be enjoined from selling his property or from taking any other action to collect the taxes and penalties assessed for the years 1942 to 1946, (b) that the Collector be ordered to restore the property previously seized, (c) that the waiver of restrictions

on assessment and collection executed by taxpayer be rescinded, cancelled, annulled and set aside, (d) that taxpayer have such other and further relief as is just. (R. 6.)

On September 6, 1951, the Collector filed a motion to dismiss taxpayer's complaint. The reasons for the motion were (1) "Lack of jurisdiction over the subject matter in that this is a suit to enjoin collection of Federal income taxes" and (2) failure to state a claim upon which relief could be granted because the taxpayer nowhere denied that he owed some Federal taxes. (R. 20.)

Before the District Court acted on this motion, taxpayer, on September 28, 1951, filed an "Amendment to Complaint" with supplemental affidavit attached. (R. 21-24.)⁵ This amendment purports to amend the original complaint by adding a second count. The allegations begin with paragraph numbered 7 and consist only of paragraphs 7 and 8 and a wherefore clause. Paragraph 7 incorporates by reference paragraphs 1, 4, 5 and 6 of the original complaint.⁶ Paragraph 8 is the allegation of facts upon which the second cause of action is predicated. With respect to this second

⁵The reasons why the previous affidavits are not summarized (see footnote 4 above) are equally applicable to this supplemental affidavit.

⁶These paragraphs incorporated by reference refer to the allegations of jurisdiction, that administrative remedies have been exhausted, that irreparable injury will be suffered if collection is not enjoined and that taxpayer has no adequate remedy at law. (R. 2-5.)

count, it is alleged that the Collector's action was taken pursuant to jeopardy assessments of income taxes, penalties and interest made on or about December 28, 1949; that such jeopardy assessments were made before any notice in respect to the tax had been mailed to taxpayer under Section 272(a) of the Internal Revenue Code and that no such notice was mailed to taxpayer within sixty days after the making of the jeopardy assessment. (R. 21-22.)

The demands made in the wherefore clause of the Amendment to the Complaint are the same as in the original complaint except that where the original complaint demands that the Collector "be enjoined * * * from selling plaintiff's property or taking any other action to collect income taxes, penalties or interest pursuant to the assessments made against plaintiff on or about December 28, 1949 * * *", the amendment reads that the Collector "be enjoined * * * from selling plaintiff's property or taking any other action to collect income taxes, penalties or interest pursuant to the *jeopardy* assessment made against plaintiff on or about December 28, 1949 * * *." (Italics supplied; R. 6, 22-23.)

In an opinion filed on October 15, 1951, the District Court granted the Collector's motion to dismiss. (R. 25.)⁷ The dismissal was predicated upon the failure

⁷Pursuant to its opinion, the District Court on or about October 17, 1951, entered its order of dismissal. Subsequently, and on or about October 18, 1951, taxpayer filed a petition for rehearing. This petition was denied on April 8, 1952. Thereafter, taxpayer

of the allegations of taxpayer's complaint to show unusual or extraordinary circumstances which would cause the specific prohibition against suits to enjoin collection of Federal taxes provided for by Section 3653(a) to be inapplicable. In commenting on taxpayer's claim that an injunction was warranted because of so-called arbitrary and oppressive conduct on the part of Government agents, the Court in its opinion said (R. 26):

In the case at bar, the improper conduct, if any, at the conferences, at which the compromises were reached, was that of plaintiff's agents and not that of the Government's representatives. This does not establish the "extraordinary circumstances" or "arbitrary and oppressive conduct of Government agents." This case does not present a situation calling for this Court to exercise its equitable powers to enjoin the collection of a tax.

On October 24, 1951, the Collector filed a motion, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure for summary judgment. (R. 27-28.) The ground for this motion was that there was no germane issue as to any material fact presented by the complaint or amendment thereto. (R. 27.) On November 13, 1951, the District Court signed an order denying the Collector's motion for summary judgment. How-

filed a notice of appeal to this Court requesting review of the District Court's order denying the petition for rehearing. On September 3, 1952, because no appealable questions were involved, this Court dismissed the appeal without prejudice. (R. 31-32.) See also *Monge v. Smyth*, 198 F. 2d 744 (C.A. 9th).

ever, this order was not filed until December 7, 1951.⁸ (R. 31.)

On November 21, 1951, the Collector filed an answer to taxpayer's second cause of action framed by the amendment to the original complaint. In this answer the allegations of paragraph 7 of the amendment to taxpayer's original complaint were denied except that it was admitted that the action arose under 28 U.S.C., Section 1340, as alleged. (R. 29.) The allegations of paragraph 8 of the amendment (that the assessment of December 28, 1949, was a jeopardy assessment) were denied except that it was admitted that a notice of tax lien against taxpayer's property had been filed and that certain sums had been collected. (R. 29-30.) As a separate and further defense, the Collector alleged that he had been suspended from office on September 27, 1951 and was therefore not a proper party to the action. (R. 30.)

After this Court's dismissal of the appeal and the remand of the action, the Collector filed, on March 11, 1953, a motion to dismiss "the action and all causes of action stated in the complaint including all amendments thereto." (R. 33.) The reasons given for the motion were (a) that the Court "has no jurisdiction over the subject matter of the action in that this is an action to enjoin the collection of Federal taxes" and

⁸It is clear that the record, when it was first before this Court, contained not only the complaint and amendment to the complaint but in addition the Collector's motion for summary judgment, his answer to the amendment to the complaint and the District Court's order denying the motion for summary judgment. (R. 31-32, 34.) See *Monge v. Smyth*, *supra*.

(b) that the complaint and amendment thereto failed to state a claim upon which relief can be granted because taxpayer does not deny that he owes some Federal taxes. (R. 33.)

On December 29, 1953, the District Court entered a memorandum and order dismissing the taxpayer's first amended complaint (the original complaint and amendment thereto) with leave to amend within thirty days. (R. 34-35.) In the memorandum, the District Court pointed out that before the present motion was filed, it had granted a motion to dismiss taxpayer's first amended complaint but did not dismiss the action; that an appeal to the Circuit Court of Appeals had been taken but dismissed because no appealable question had been presented; that when it had granted the prior motion to dismiss both the original and first amended complaint were before the court; that the only new allegations now before the court were those contained in the affidavit filed in opposition to the motion to dismiss the action; that the amended complaint does not contain sufficient allegations to invoke the jurisdiction of the Court and therefore must be dismissed; but, however, because the affidavit filed in opposition to the Collector's motion suggests that taxpayer can amend his complaint so as to invoke the court's jurisdiction, leave is given to so amend. (R. 34-35.)

On October 21, 1953, taxpayer filed a second amended complaint for injunctive relief to which he attached his affidavit as Exhibit A. In this complaint both James G. Smyth, Collector, and Glen T. Jamison,

Director, and successor in office to Smyth (hereinafter referred to as the Director) were named as defendants. This second amended complaint purports to state two separate causes of action for each of which taxpayer prays the Court to restrain collection, restore his property and rescind the waiver agreement.⁹ As a first cause of action, taxpayer alleges that certain taxes, penalties and interest totalling \$43,313.08 for the tax years 1942-1946 had been assessed, when, in fact, he did not owe this sum or any other sum as taxes, penalties or interest for the years in question; that the assessment was in violation of Section 272 (a)(1) since no notice, as required by Section 272 of the Internal Revenue Code, had been served upon him; that the Collector, acting through his agents, filed or caused to be filed on January 4, 1950, a tax lien against all of taxpayer's property, and levied and seized on or about March 27, 1951, bank accounts in the amounts of \$8,526.42; that on or about April 8, 1952, the Director, acting through his agents, seized for sale all of taxpayer's real and personal property but that such sale had been enjoined by the District Court. (R. 37-38.) It was further alleged that taxpayer had exhausted all administrative remedies available to him; that because of the seizure, taxpayer was without sufficient funds to conduct his business or defray his living and necessary medical expenses

⁹This second amended complaint does not contain allegations that the conduct of the Government agents was arbitrary and oppressive. Likewise the taxpayer's affidavit attached does not contain statements concerning circumstances resulting from the execution by him of the waiver agreement.

and that unless sale of his property is restrained and unless his property is restored and the assessment set aside, he will suffer great and irreparable injury. Additionally it is alleged that taxpayer had no adequate remedy at law. (R. 36-38.)

The taxpayer's prayers in his wherefore clause are essentially the same as those contained in his original complaint filed on July 5, 1951. (R. 6, 39.)

The allegations set forth as a second and separate cause of action are the same as those alleged for the first cause of action except that it is alleged that "during the month of January 1950 the Collector levied a *jeopardy* assessment¹⁰ against taxpayer for taxes, penalties and interest for the years 1942 to 1946 in the total amount of \$43,313.08, when in truth and in fact, taxpayer did not owe any taxes, penalties or interest for the years 1942 through and including 1946"; that the Collector and Director, their agents, servants and employees, did fail and have not to date served taxpayer with notice as required by Section 273(b) of the Internal Revenue Code. (R. 40-41.)

The prayers of the wherefore clause set forth as part of the second separate and distinct cause of action are essentially the same as the prayers made in the wherefore clause of the first cause of action and the wherefore clause of the amendment to the

¹⁰It is noteworthy that taxpayer in his second amended complaint alleges that the so-called jeopardy assessment was a levy made in January 1950, whereas in his amendment to the original complaint, he alleges that the so-called jeopardy assessment was the notice of December 28, 1949. (R. 22, 41.)

complaint filed on September 28, 1951. (R. 22-23, 39, 42.)

On October 21, 1953, the District Court entered an order to show cause directing the Collector and the Director to show cause why they should not be enjoined during the pendency of the proceedings from any further seizure or sale of taxpayer's property or any further execution or collection of taxes from the taxpayer. (R. 40-47.)

After a hearing and submission of briefs by the parties, the District Court, by order dated June 30, 1954, dismissed taxpayer's action and vacated its previously entered order to show cause. (R. 48.) In this order the District Court said (R. 48):

Plaintiff's second amended complaint contained no new issues of law other than those which were considered and determined by the Court when it dismissed the original and first amended complaint.

On July 21, 1954, taxpayer filed a notice of appeal to this Court from the District Court's "Order dismissing plaintiff's action entered on June 30, 1954." (R. 49.)

SUMMARY OF ARGUMENT.

The District Court correctly concluded that it did not have jurisdiction over taxpayer's suit to restrain collection of Federal income taxes. Section 3653(a) of the Internal Revenue Code of 1939, prohibits suits

to enjoin collection of income taxes except where certain judicially determined extraordinary and unusual circumstances exist or except where the provisions of subsection (a) of Section 272 of the Internal Revenue Code of 1939 apply.

Taxpayer's contention—that the conduct of Government agent was arbitrary and oppressive and that therefore the extraordinary or unusual circumstances authorizing a suit to restrain collection exist—is not supported by the allegations of his complaint or affidavits. These allegations show that if there was any improper conduct, it was that of taxpayer's agent and not the Government agents.

Taxpayer's contention—that the assessments here involved are not valid because no statutory deficiency notice was issued and that, therefore, in effect, his suit is authorized by subsection (a) of Section 272—is without merit. Subsection (a) of Section 272 authorizes suits to restrain collection only where collection is attempted after a statutory notice of deficiency has been issued and the deficiency there asserted has not been finally determined. Here, there was no statutory notice issued and, therefore, the provisions of subsection (a) of Section 272 do not apply. Taxpayer's reasoning—that even though no statutory deficiency notice was issued such a notice should have been issued and absence such notice collection should be enjoined—is erroneous. This is so because taxpayer executed waiver form 870 T.S. and the waiver was accepted by the Commissioner. Since the execution of the waiver and its acceptance creates a binding agree-

ment establishing the exact deficiency and further provides that the deficiency can be assessed and collected at any time, no separate formal deficiency determination or other notice thereof is required.

ARGUMENT.

THE DISTRICT COURT CORRECTLY CONCLUDED THAT IT DID NOT HAVE JURISDICTION OF THE SUBJECT MATTER OF TAXPAYER'S SUIT TO ENJOIN COLLECTION OF FEDERAL TAXES BECAUSE OF THE PROHIBITION AGAINST SUCH SUITS PROVIDED FOR BY SECTION 3653(a) OF THE INTERNAL REVENUE CODE.

This is an appeal from "the order dismissing plaintiff's action entered on June 30, 1954." (R. 49.) In the order appealed from the District Court said (R. 48):

Plaintiff's second amended complaint presents no issues of law other than those which were considered and determined by the Court when it dismissed the original and first amended complaints.

Taxpayer does not challenge the fact that no new issues were presented by his second amended complaint and an examination of the original complaint (R. 3-6), the amendment thereto (R. 21-23) and the second amended complaint (R. 36-42) establishes that the second amended complaint reframed some of the allegations previously made but did not add anything new.

The basic issue of law considered and determined by the District Court was whether the allegations of taxpayer's complaints established its jurisdiction over the subject matter of the suit despite the prohibition

of Section 3653(a) of the Internal Revenue Code of 1939. (Appendix A, *infra*.) This is made manifest by the Collector's motions to dismiss and by the District Court's opinions (opinion entered October 15, 1954, and memorandum and order entered September 29, 1953) granting the Collector's motions.

The primary ground for the Collector's motions to dismiss was that the District Court did not have "jurisdiction over the subject matter in that this is a suit to enjoin collection of federal taxes." (R. 20, 33.) The District Court in its opinion and its memorandum and order recognized that these motions raised the question whether it had jurisdiction because of the specific statutory prohibition set out in Section 3653 (a) against suits to enjoin collection of federal taxes. (R. 25.) The District Court also recognized that collection has on occasion been enjoined despite the statutory mandate where there was a showing of extraordinary facts and circumstances such as a showing that the conduct of the Government's agents in assessing the tax was arbitrary or oppressive and that taxpayer contends that his allegations show the existence of a situation where collection should be enjoined despite the statutory prohibition. (R. 26.) The District Court concluded that the allegations of taxpayer's complaints did not show the existence of a "situation calling for the Court to exercise its equitable powers to enjoin collection of a tax." (R. 26, 34-35, 48.) Taxpayer's appeal from the District Court's order of June 30, 1954, therefore, presents on appeal the basic question whether the District Court correctly con-

cluded that the statutory provision of Section 3653(a) precluded it from entertaining taxpayer's suit to enjoin the collection of federal taxes. It is our position that the District Court correctly concluded that it did not have jurisdiction of the subject matter and that its order dismissing taxpayer's action is correct.

Section 3653(a) provides "Except as provided in Section 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Although it has been held that this statutory prohibition against maintaining a suit to restrain the assessment or collection of any tax in any Court may be relaxed in particular cases under extraordinary and entirely exceptional circumstances, it is clear that a claim on the part of the taxpayer that he does not owe a tax, or that it has been illegally and improperly assessed or that the collection of the tax will result in hardship does not constitute ground for the issuance of an injunction. If it were not so, the whole scheme of federal taxation would be frustrated. *The Jewel Shop of Abbeville, S. C. v. Pitts* (C. A. 4th), decided February 3, 1955 (1955 CCH, Par. 9206); *Millikin v. Gill*, 211 F. 2d 869 (C. A. 4th); *Matcovich v. Nickell*, 134 F. 2d 837 (C. A. 9th); *Mitsukiyo Yoshimura v. Alsup*, 167 F. 2d 104 (C. A. 9th); *Voss v. Hinds*, 208 F. 2d 912 (C. A. 10th); *Reams v. Vroom-Fehn Printing Co.*, 140 F. 2d 237 (C. A. 6th), 9 Mertens Law of Federal Income Taxation, Sections 49.170, 49.171, 49.172.

The nature of the extraordinary and exceptional circumstances which cause the prohibition of Section

3653(a) to fall away is described and explained in some detail in this Court's decisions in *Mitsukiyo Yoshimura v. Alsup*, *supra*, and *Matcovich v. Nickell*, *supra*. In the *Mitsukiyo Yoshimura* case, it was alleged that Government agents secured in 1944 from the taxpayer, a subject of Japan living near Pearl Harbor, a waiver (Form 870) of restrictions on assessment and collection of federal taxes for the years 1941, 1942 and 1943 by threatening to have the taxpayer interned as an enemy alien. This Court held that the conduct of the Government agents was fraudulent and coercive and gave rise to extraordinary circumstances which cause the statutory prohibition not to apply. In the *Matcovich* case, this Court affirmed the District Court's action in dismissing the taxpayer's suit to enjoin collection of federal taxes because of the prohibition of Section 3653(a). However, this Court recognized that situations could arise where the statutory prohibition should not apply. It was said (p. 838):

Section 3653 of the Internal Revenue Code prohibits suits to restrain the assessment or collection "of any tax" "in any court." Despite the positive prohibition of Section 3653, I.R.C., it has been held that there may be a case stated wherein injunctive relief properly may be granted to restrain the assessment or collection of a tax. See, for instance, *Miller v. Standard Nut Margarine Co.*, 284 U. S. 498, 509, 510, 52 S. Ct. 260, 76 L. Ed. 422; *Graham v. DuPont*, 262 U. S. 234, 43 S. Ct. 567, 67 L. Ed. 965; *Allen v. Regents*, 304 U. S. 439, 445, 58 S. Ct. 980, 82 L. Ed. 1448. But such a case must, obviously, be the unusual, the extraordinary case. Mere illegality of the exac-

tion is not sufficient to justify a holding that the statute is not applicable (*Allen v. Shelton*, 5 Cir., 96 F. 2d 102), nor is hardship to the taxpayer. *Kaus v. Huston*, 8 Cir., 120 F. 2d 183, 185. We think Section 3653, I.R.C. applied except in a case wherein it is shown, in addition to the fundamental allegations necessary to obtain injunctive relief, that under no possibility could the attempted exaction be held legal (cf. *Miller v. Standard Nut Margarine Co.*, *supra*), or in the unusual and extraordinary circumstances such as confronted the court in *Graham v. DuPont*, 262 U. S. 234, 43 S. Ct. 567, 67 L. Ed. 965, and in *Allen v. Regents*, 304 U. S. 439, 445, 58 S. Ct. 980, 82 L. Ed. 1448. Appellant has stated no such case.

Other than these judicial exceptions to the broad prohibition of Section 3653(a), there are the specific exceptions in the statute itself: "Except as provided in Section 272(a), 871(a) and 1012(a), no 1012(a), no suit * * * may be maintained in any court."

Since the statutory exception provided for by Sections 871(a) and 1012(a) apply only where estate and gift taxes are involved, they are manifestly not material here. Therefore, the only statutory exception which may be material here is Section 272(a) of the Internal Revenue Code (Appendix A, *infra*). This section provides that where the Commissioner determines a deficiency in income taxes and sends a notice of such deficiency to the taxpayer by registered mail, then the taxpayer has ninety days in which to file a petition for redetermination with the Tax Court and that during this period——

no assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court.

Accordingly, the provision authorizes the filing of suits to enjoin collection despite the prohibition of Section 3653(a) only when a statutory notice of deficiency has been mailed to the taxpayer and (1) the Collector before the ninety-day period has run attempts to distraint and collect and (2) where a petition for redetermination has been filed with the Tax Court in response to the deficiency notice within the prescribed ninety days and the Collector, without the authority of a jeopardy assessment, attempts to distraint and collect. Therefore, only where a deficiency notice has been issued can the taxpayer bring suit to restrain collection. Moreover, the taxpayer can waive the restrictions on assessment and collection provided for by Section 272(a) by signing a notice in writing agreeing to waive the restrictions.¹¹ Statutory author-

¹¹There are many practical reasons why it is advantageous to taxpayers to sign the waiver on restrictions. For one thing the signing of the waiver stops the running of interest and for another thing the waiver, as here, often involves a compromise of the tax liability.

ity for such waivers is found in subsection (d) of Section 272 which reads:

The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

Accordingly, where the taxpayer signs a notice in writing pursuant to the provisions of subsection (d), he waives the restrictions on assessment and collection provided for by subsection (a) and consequently cannot enjoin the Collector from proceeding, in accordance with the waiver agreement, to collect the agreed to tax. See *Associated Mutuals v. Delaney*, 176 F. 2d 179 (C. A. 1st); cf. *Victory v. Manning*, 128 F. 2d 415 (C. A. 3d).

Taxpayer in his first specification of error (Br. 6) and his argument (Br. 9-10) under point I asserts and argues that the conduct of the Government agents was arbitrary and oppressive. It, therefore, appears that taxpayer's first contention is that the District Court erred because it failed to conclude that his suit falls within the judicial exception to the prohibition of Section 3653(a). In his second and third specifications of error (Br. 6) and his arguments (Br. 10-14), taxpayer asserts and argues that the assessments were invalid because a statutory deficiency notice was not issued and therefore collection should be enjoined. It, therefore, appears that taxpayer's second contention is that the District Court erred because it failed

to conclude that his suit comes within the terms of the Section 272(a) statutory exception to Section 3653 (a). These contentions are without merit; the first because arbitrary and oppressive conduct is not sufficiently alleged; the second because no statutory notice of deficiency was required since taxpayer waived issuance of such a notice by executing waiver Form 870 T.S.

1. **Neither the Allegations of Taxpayer's Complaint or His Affidavits in Support Thereof Establish Arbitrary or Oppressive Conduct by Government Agents. Therefore, Extraordinary Circumstances Warranting a Suit to Restrain Collection Are Not Shown.**

Taxpayer alleges in his original complaint that for reasons adverse to his interest *his attorney* Abraham Buchman advised and induced him to execute, and he did execute, United States Treasury Department Form 870 T. S. waiver of restrictions on assessment and collection. Taxpayer does not allege that Government agents advised or induced him to sign the waiver. He does not allege that Government agents threatened, coerced or fraudulently caused him to execute the waiver form. Taxpayer's only allegation with respect to the conduct of the Government agents is (R. 4) that:

At all times that he [Abraham Buchman] so advised and represented plaintiff [taxpayer] said Abraham Buchman also represented persons having an interest in the matter of plaintiff's tax liability adverse to and in conflict with plaintiff's interest which adverse interest was known to said representatives of the Bureau of Internal Rev-

enue but was not known to plaintiff or disclosed to him by said Abraham Buchman.

Clearly these allegations do not show that taxpayer executed the waiver on restrictions because he was coerced, threatened or otherwise treated arbitrarily or oppressively by Government agents. On the contrary, his allegations reveal as the District Court observed (R. 26) :

In the case at bar the improper conduct, if any, at the conferences at which the compromises were reached, was that of the plaintiff's agents and not that of the government's representatives. This does not establish the "extraordinary circumstances" or "arbitrary and oppressive conduct of government agents." This case does not present a situation calling for this court to exercise its equitable powers to enjoin the collection of a tax.

Taxpayer does not deal with the question whether the allegations of his complaint show arbitrary or oppressive conduct. Rather, he argues (Br. 9-10) that his affidavit and the affidavit of Wareham C. Seaman "set forth sufficient allegations to justify a finding that the action of the defendant in making the assessment and levying against appellant was arbitrary and oppressive." It is our position that the allegations of the affidavits are not material and that even if they are material they fall far short of showing the extraordinary and unusual circumstances which warrant a suit to restrain despite the broad prohibition. The allegations of the affidavits are not material because the Collector's motions to dismiss (R. 20, 33) placed

in issue only the sufficiency of the allegations of the complaint. Where, as here (R. 34), the District Court decides the question raised on the motion to dismiss on the basis of the allegations of the complaint alone, then on review only those allegations are to be considered. See *Land v. Dollar*, 330 U. S. 731; *Gibbs v. Buck*, 307 U. S. 71, 72. Taxpayer was given two opportunities to amend his complaint so that he could state in his complaint sufficient grounds to justify the relief he sought. (R. 21-23, 34, 36-42.)

In any event, the allegations of the affidavits do not show the existence of extraordinary or unusual circumstances warranting an injunction. This is so because those allegations show that taxpayer signed the waiver in reliance upon representations of his own attorney, not upon representations of the Government agents (R. 10-12); that no force or threats were used by the Government (R. 10-15) and that contrary to taxpayer contentions (Br. 9), the case was considered administratively even after a compromise settlement had been effectuated. (R. 16-19.) Thus, it is clear from the affidavits that taxpayer was not forced to compromise and settle his tax liabilities by arbitrary or oppressive conduct by Government agents. Accordingly, his affidavits do not show the existence of extraordinary circumstances which might warrant his suit to restrain collection. *Jewel Shop of Abbeville, S. C. v. Pitts, supra*; *Matcovich v. Nickell, supra*; *Mitsukiyo Yoshimura v. Alsup, supra*.

Taxpayer, even though he cannot show directly arbitrary or coercive conduct, apparently would like this

Court to infer that there was such conduct because Government agents supposedly knew that his (taxpayer's) agents represented interests adverse to taxpayer and that therefore they should have refused to accept his waiver or should have subsequently set it aside. However, there is nothing in the affidavits which shows definitely that the Government agents knew that taxpayer's attorney was not actually acting in taxpayer's interest.¹² Furthermore, taxpayer admits (Br. 9) that the Collector is not charged with the responsibility of determining the good faith of his (taxpayer's) representatives.

Moreover, taxpayer's second amended complaint does not allege that the conduct of the Government agents was arbitrary and oppressive, nor does it incorporate by reference the allegations to this effect set out in the original complaint. (R. 36-42.) Therefore, it appears that taxpayer abandoned this claim in the District Court and, furthermore, that taxpayer's failure to reallege the allegations of the original complaint made it impossible for the District Court to grant an injunction on the ground that the conduct of Government agents was arbitrary and oppressive. Accordingly, it would appear that taxpayer's first specification (Br. 6), and his argument thereunder (Br. 9-10), should not be considered by this Court.

¹²It is significant that taxpayer's tax liability was reduced by about \$20,000 as a result of the compromise agreement embodied in the waiver. (R. 9, 13.)

2. **The Assessments Were Clearly Valid and the Commissioner Was Not Required to Issue a Statutory Notice of Deficiency Because Taxpayer Executed Waiver Form 870 T. S. Therefore, Collection Could Not Be Enjoined.**

As noted above, the only statutory exception to the prohibition against suits to restrain collection of federal income taxes is that set forth in Section 272(a). As also noted above, this exception only operates where a statutory notice of deficiency has been issued and collection is commenced either (1) when the ninety-day period has not run or (2) the taxpayer has filed a petition for redetermination with the Tax Court and that Court's determination has not become final. Therefore, no suit, based on the authority of Section 272(a), to restrain collection can be maintained unless a statutory notice of deficiency has been issued.¹³ Here, the fundamental fact is that no statutory notice of deficiency was issued or required to be issued. It follows, therefore, that taxpayer has no basis in law for his action.

The substance of taxpayer's argument under points II and III (Br. 10-14) in the absence of a sound factual basis is that a statutory notice of deficiency should have been issued; that because it was not issued the assessment was invalid and consequently collection should be enjoined. Taxpayer contends (Br. 10-14) that a deficiency notice was required (1) because the assessments were jeopardy assessments and Section 273(b) of the Internal Revenue Code of 1939 (Appendix A, *infra*) required a statutory notice of defi-

¹³Unless the statutory notice is issued, the taxpayer cannot file a petition for redetermination with the Tax Court. Section 272(a).

ciency to be issued sixty days after such assessment and (2) because, even if the assessments were not a jeopardy assessments there must be a determination of deficiency as provided for in subsection (a) of Section 272. The short and complete answer to these two contentions is that the execution by the taxpayer of waiver Form 870 T.S. eliminates any necessity for either a determination of deficiency under Section 272(a) or for a jeopardy assessment under Section 273(a) of the Internal Revenue Code of 1939 (Appendix A, *infra*). In *Associated Mutuals v. Delaney*, *supra*, the Court of Appeals for the First Circuit thoroughly considers the effect of the execution of a waiver similar to the one now before this Court. In response to an argument, similar in all material respects to that made by taxpayer here under his point III, the Court said (pp. 182-183):

Appellant advances a separate point, that the waiver of the restrictions on assessment and collection of the proposed deficiency was ineffective because it was filed before a formal deficiency notice under § 272(a) was sent. The language of the statute itself refutes this argument. Section 272(d) gives the taxpayer the right to submit a waiver "at any time", and it is to the taxpayer's advantage to file a waiver to a proposed deficiency because I.R.C. § 292(a), 26 U.S.C.A. § 292(a), imposes interest on deficiencies at the rate of 6% per year from "the date prescribed for the payment of the tax * * * to the date the deficiency is assessed, or, in the case of a waiver under section 272(d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed

whichever is the earlier." Several cases hold that a waiver to a proposed deficiency is effective to stop the running of interest thirty days after filing. *Moore v. Cleveland Ry. Co.*, 6 Cir., 1940, 108 F. 2d 656; *Roos v. United States*, 1940, 31 F. Supp. 144, 90 Ct. Cl. 482; *Diamond Alkali Co. v. Driscoll*, D.C., W. D. Pa. 1940, 27 A.F.T.R. 1083. Furthermore, the right is given the taxpayer by § 272(d) "to waive the restrictions provided in subsection (a) of this section on the assessment and collection" of a deficiency; and reference back to § 272(a) discloses that the first of these "restrictions", or conditions which must be met before the Commissioner is authorized to make assessment and distraint, is the mailing to the taxpayer of a notice of the determination of a deficiency. As stated by Dean Griswold, a waiver to a proposed deficiency, under § 272(d), "allows the Commissioner to assess and collect the tax without first sending the taxpayer a deficiency letter which can be used as the basis for a petition in the Tax Court." Note, 57 Harv. L. Rev. 912, 914 n. 16 (1944). See also Griswold, *Cases and Materials on Federal Taxation* 90 (2d ed. 1946); 9 Mertens, *Law of Federal Income Taxation* §§ 49.02, 49.37, 49.99, 49.100 (1943); 3 CCH 1949 Fed. Tax Rep. par. 1354.847. The Monograph of the Attorney General's Committee on Administrative Procedure, pt. 9, *Administration of Internal Revenue Laws*, reprinted as Sen. Doc. No. 10, 77th Cong., 1st Sess., 11 n. 55 (1941), states: "If no notice of deficiency has been sent when the waiver is signed, its execution in effect waives the privilege of going to the Board of Tax Appeals, since the jurisdiction of the Board depends upon the send-

ing of a deficiency notice which the waiver relieves the Commissioner of doing." Cf. *Victory v. Manning*, 3 Cir., 1942, 128 F. 2d 415; see *Bayson v. Commissioner*, 2 Cir., 1948, 166 F. 2d 1008, 1009-1010.¹⁴

In subsequent parts of this same opinion, the First Circuit fully answers taxpayer's argument on the effect of the legislative history of Section 272(d). See *Associated Mutuals v. Delaney*, *supra*, p. 183. The First Circuit also answered taxpayer's arguments based on this Court's decisions in *Mutual Lumber Co. v. Poe*, 66 F. 2d 904, certiorari denied, 290 U. S. 706 and *McCarthy Co. v. Commissioner*, 80 F. 2d 618, certiorari denied, 298 U. S. 655 when it pointed out (pp. 183-184):

Hence, we conclude that the waiver appellant filed to the deficiency proposed by the revenue agent obviated the need for the Commissioner to send a formal deficiency notice and precluded appeal to the Tax Court. *Mutual Lumber Co. v. Poe*, 9 Cir., 1933, 66 F. 2d 904, certiorari denied 1934, 290 U.S. 706, 54 S. Ct. 373, 78 L. Ed. 606, and *McCarthy Co. v. Commissioner*, 9 Cir., 1935, 80 F. 2d 618, certiorari denied 1936, 298 U.S. 655, 56 S. Ct. 675, 80 L. Ed. 1381, involved different problems. In so far as their reasoning may be contrary to our present decision, we do not regard

¹⁴Manifestly, if notice of a deficiency determination is not required under subsection (a) of Section 272, it would not be required under subsection (b) of Section 273. Furthermore, there would be no need for the collector to make a determination that collection was in jeopardy and make a jeopardy assessment where the waiver permits him to collect at any time without making such a determination.

the denials of certiorari or the absence of subsequent statutory disapproval as indicating acceptance of such reasoning. See Report of Subcommittee on Internal Revenue Taxation of House Committee on Ways and Means, 75th Cong., 3d Sess., 53-54 (1938), quoted in Seidman, *Legislative History of Federal Income Tax Laws* 95-96 (1938); *Moore v. Cleveland Ry. Co.*, *supra*; *Cleveland v. United States*, 1946, 329 U.S. 14, 21, 22, 67 S. Ct. 13, 16, 17, 91 L. Ed. 12, concurring opinion; cf. *Girouard v. United States*, 1946, 328 U.S. 61, S. Ct. 826, 90 L. Ed. 1084.

East Bay Water Co. v. McLaughlin, 24 F. Supp. 222 (N. D. Cal.) relied upon by taxpayer (Br. 14) is distinguishable from the present case for the same reasons that the *Mutual Lumber and McCarthy Co.* cases are distinguishable. None of these cases involved the question here—whether a waiver form 870 T.S. executed by the taxpayer and accepted for the Commissioner by his authorized agents was invalid because a statutory deficiency notice had not been issued previously. In the *Mutual Lumber and McCarthy Co.* cases the question was whether the Commissioner could issue a statutory notice of deficiency to stop the statute of limitations from running where the taxpayer had executed a form 870 waiver. In the *East Bay Water Co.*, the question was whether taxpayer's execution of a waiver which was not accepted by the Commissioner through his authorized agents was valid and stopped the accrual of interest where a statutory notice of deficiency had not previously been issued. There is a marked and substantial difference between

waiver form 870 and waiver form 870 T.S. Although both are waivers under Section 272(d) and authorize immediate assessment and collection without the sending of a statutory notice of deficiency, Form 870 does not contain a binding agreement on the part of either the Commissioner or the taxpayer as to the tax deficiency set up therein. See *United States v. Goldstein*, 189 F. 2d 752 (C. A. 1st). It is a unilateral waiver by the taxpayer under Section 272(d). Form 870 T.S., on the other hand, is designed to be a bilateral agreement which will form the basis for a final closing agreement and it provides that if the waiver (proposal) is accepted by or on behalf of the Commissioner "the case shall not be reopened nor shall any claim for refund be filed respecting the taxes * * *" (Appendix A, *infra*). Clearly, therefore, the Commissioner's acceptance of the waiver form 870 T.S. is the equivalent of a final determination of the deficiency since his acceptance can only imply that the deficiency has finally been determined to be the sum agreed upon in the waiver. Since the Commissioner does make a final determination of deficiency when he accepts and agrees to be bound by the waiver agreement (Form 870 T.S.), it follows that this Court's reason for holding the waiver and assessment invalid in the *Mutual Lumber* and *McCarthy Co.* cases does not apply here. Furthermore, although corresponding provisions of the Internal Revenue Code of 1954 are not applicable to the present problem, it is clearly evident, contrary to taxpayer's assertion (Br. 14), that the execution of the waiver provided in subsection (d) of Section

6213 makes it unnecessary for there to be a formal deficiency determination. Subsection (d) of Section 6213 of the Internal Revenue Code of 1954 reads:

The taxpayer shall at any time (*whether or not a notice of deficiency has been issued*) have the right by a signed notice in writing filed with the Secretary or his delegate, to waive restrictions provided in subsection (a) on the assessment or collection of the whole or any part of the deficiency. (*Italics supplied.*)

Clearly the execution of waiver form 870 T.S. by the taxpayer and the acceptance of that waiver by the Commissioner precluded the necessity of making a formal deficiency determination or a jeopardy assessment. Accordingly, taxpayer's suit to restrain collection is not authorized by subsection (a) of Section 272.

The real nub of taxpayer's contention is that he does not have an adequate remedy and means to litigate his tax liability because he has executed waiver form 870 T.S. which he feels to be invalid. Actually, taxpayer does have a complete and adequate remedy by way of a refund suit. See *Phillips v. Commissioner*, 283 U.S. 589; *In Re State Railroad Tax Cases*, 92 U.S. 575, 613; *Millikin v. Gill*, *supra*. There is nothing to prevent taxpayer from bringing such a suit and there testing the validity of the waiver form 870 T.S. The Government does not seek to avoid litigation of any meritorious claim. It does, however, feel that where, as here, there is an adequate remedy at law; that the administration of the tax laws should not be

prejudiced and delayed by the undesirable and unnecessary use of an injunction suit.

CONCLUSION.

The District Court's order dismissing taxpayer's action is correct and should be affirmed.

Dated, San Francisco, California,
March 28, 1955.

Respectfully submitted,

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

ALONZO W. WATSON, JR.,

Attorney, Office of Regional Counsel,

Internal Revenue Service.

(Appendices A and B Follow.)



Appendices A and B.



Appendix A

Internal Revenue Code of 1939:

SEC. 272. PROCEDURE IN GENERAL.

(a)(1) [As amended by Sec. 203 of the Act of December 29, 1945, c. 562, 59 Stat. 669] *Petition to the Tax Court of the United States*.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the ninetieth day), the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. No assessment of a deficiency in respect of the tax imposed by this chapter and no distraint or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such ninety-day period, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of Section 3653(a) the making of such assessment or the beginning of such proceeding or distraint during the time such prohibition is in force may be enjoined by a proceeding in the proper court. * * *

* * * * *

(d) *Waiver of restrictions*.—The taxpayer shall at any time have the right, by a signed notice in writing filed with the Commissioner, to waive the

restrictions provided in subsection (a) of this section on the assessment and collection of the whole or any part of the deficiency.

* * * * *

(26 U.S.C. 1946 ed., Sec. 272.)

SEC. 273. JEOPARDY ASSESSMENTS.

(a) *Authority for making*.—If the Commissioner believes that the assessment or collection of a deficiency will be jeopardized by delay, he shall immediately assess such deficiency (together with all interest, additional amounts, or additions to the tax provided for by law) and notice and demand shall be made by the collector for the payment thereof.

(b) *Deficiency letters*.—If the jeopardy assessment is made before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under section 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment.

* * * * *

(26 U.S.C. 1946 ed., Sec. 273.)

SEC. 3653. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax*.—Except as provided in sections 272(a), 871(a) and 1012(a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U.S.C. 1946 ed., Sec. 3653.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.272-1. ASSESSMENT OF A DEFICIENCY.

* * * * *

(5) The taxpayer may at any time by a signed notice in writing filed with the Commissioner waive the restrictions on the assessment of the whole or any part of the deficiency. The notice must in all cases be filed with the Commissioner. The filing of such notice with the Tax Court does not constitute filing with the Commissioner within the meaning of the Internal Revenue Code. After such waiver has been acted upon by the Commissioner and the assessment has been made in accordance with its terms, the waiver cannot be withdrawn.

* * * * *

Appendix B

CERTIFICATE.

I hereby certify that the annexed photostat constitutes a true copy of a duplicate original Form 870-TS offer of waiver of restrictions on assessments and collection of deficiency in tax accepted on behalf of the Commissioner on December 16, 1949, and of Pacific Division, Technical Staff Action Memorandum to which said Form 870-TS is attached, and that the same constitute official records of the Bureau of Internal Revenue in my custody.

Glen T. Jamison,
Director of Internal Revenue.

C:TS:PD
SF:HMS

Form 870-TS
Treasury Department
Internal Revenue Service
(Revised Sept. 1941)

(Date Received)
Nov. 2, 1949
Technical Staff
Pacific Division
San Francisco Office

OFFER OF WAIVER OF RESTRICTIONS ON
ASSESSMENTS AND COLLECTION OF
DEFICIENCY IN TAX

Accepted Dec. 16, 1949

(Signed) Stewart Berkshire
(Head of Division)

Re: Bartolomeo Monge
Oakdale, California

Pursuant to the provisions of section 272(d) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, the undersigned offers to waive the restrictions provided in section 272(a) of the Internal Revenue Code, and/or the corresponding provisions of prior internal revenue laws, and hereby offers to consent to the assessment and collection of the following deficiency or deficiencies in tax and penalty:

e year ended December 31, 1943	income tax in the sum of \$ 5,577.96
e year ended December 31, 1944	income tax in the sum of \$ 7,111.45
e year ended December 31, 1945	income tax in the sum of \$ 4,991.83
e year ended December 31, 1946	income tax in the sum of \$ 7,005.51
e year ended	in the sum of \$
ting to the total sum of	\$24,686.75

together with interest thereon as provided by law.

This Offer of Waiver of Restrictions is subject to acceptance by or on behalf of the Commissioner of Internal Revenue, on the basis of the adjusted liability as hereinabove proposed, and is to take effect as a waiver of restrictions then filed with the Commissioner, from the date said adjusted liability is accepted by or on behalf of the Commissioner as a basis for the closing of the case, and if not thus accepted will have no force or effect.

If this proposal is accepted by or on behalf of the Commissioner, the case shall not be reopened nor shall any claim for refund be filed or prosecuted respecting the taxes for the year(s) above stated, in the absence of fraud, malfeasance, concealment or misrepresentation of material fact, or of an important mistake in mathematical calculations; and the taxpayer also agrees: (1) To make payment of the above deficiency, together with interest, as provided by law, promptly upon receipt of notice and demand from the Collector of Internal Revenue, and not to file an offer in compromise respecting such liability; and (2) upon request of the Commissioner to execute at any time a final closing agreement as to the tax liability, on the

foregoing basis, for said year(s) under the provisions of section 3760 of the Internal Revenue Code.

Bartolomeo Monge
(Taxpayer)

.....
(Taxpayer)

Rt-1-Box 61—Oakdale, Calif

Date Nov 2th 1949 By.....

NOTE.—The execution and filing of this offer of waiver at the address shown in the accompanying letter will expedite the adjustment of your tax liability as indicated above. It is not, however, a final closing agreement under section 3760 of the Internal Revenue Code, nor does it extend the statutory period of limitation for refund, assessment, or collection of the tax.

If this offer of waiver is executed with respect to a year for which a JOINT RETURN OF A HUSBAND AND WIFE was filed, it must be signed by both spouses, except that one spouse may sign as the agent for the other.

Where the taxpayer is a corporation, the offer of waiver shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal of the corporation must be affixed.

(This copy to be retained by petitioner)

RAC

C:TS:PD

SF:HMS

PACIFIC DIVISION, TECHNICAL STAFF
ACTION MEMORANDUM

In re: Conference Report dated T.S. Nos. (1) 4855
July 20, 1949 (2) A-4855

Symbols: IRA:Conf. No. 12413

Taxpayers:

- (1) Bartolomeo Monge
- (2) Mary Monge
Oakdale, California

Represented by:

A. M. Buchman
New York, New York

Collection District:

First, California

<u>Year</u>	<u>Kind of Tax</u>	<u>Findings of I. R. Agent in Charge</u>		<u>Date of Limitation</u>
		<u>Deficiency</u>	<u>Overassessment</u>	
(1) 1943	Income	\$ 9,278.95	—	6/30/50
	50% Penalty	4,639.48	—	
1944	Income	15,972.93	—	6/30/50
	50% Penalty	7,986.36	—	
1945	Income	7,996.54	—	6/30/50
	50% Penalty	3,998.27	—	
1946	Income	8,959.99	—	3/15/50
	50% Penalty	4,479.99	—	
(2) 1943	Income	—	\$ 458.61	6/30/49
1944	Income	—	617.00	3/15/48
1945	Income	—	390.00	3/15/46
1946	Income	—	643.00	3/15/50

Internal Revenue Agent in Charge,
San Francisco, California.

I return herewith the files relating to the above-described cases, accompanied by a statement of the issues, the relevant facts and law, and the conclusion reached, with the grounds therefor. This statement has my approval and is incorporated as a part of the record of the cases. The Staff Division has reached the following—

Bartolomeo Monge

Mary Monge

Action Memorandum

DECISION:

	<u>Year</u>	<u>Kind of Tax</u>	<u>Deficiency</u>	<u>Overassessment</u>
(1)	1943	Income	\$5,577.96	—
		50% Penalty	2,788.98	—
	1944	Income	7,111.45	—
		50% Penalty	3,555.72	—
	1945	Income	4,991.83	—
		50% Penalty	2,495.92	—
	1946	Income	7,005.51	—
		50% Penalty	3,502.76	—
			<hr/>	
			\$37,030.13	
(2)	1943	Income	—	\$458.61*
	1944	Income	—	617.00*
	1945	Income	—	390.00*
	1946	Income	—	643.00

*Refund not allowed for the years 1943 to 1945, inclusive, since statutory period has expired.

The taxpayer accepts the foregoing determination, as set forth in the accompanying agreement, which waives the statutory restriction on assessment and collection.

Appropriate action should be taken in accordance with paragraph 5 of Commissioner's Mimeograph, R. A. No. 1014, T. S. No. 57.

By direction of the Commissioner:

(Signed) Stewart Berkshire

Head of Division.

Date: Dec 16 1949

HMSorrell/pan
12/13/49

HMS
Dec 14 1949

WHL
Dec 15 1949

NO. 14494

In the
United States
Court of Appeals
for the Ninth Circuit

BARTOLOMEO MONGE,

Appellant,

vs.

JAMES G. SMYTH, Collector of Internal Revenue
for the First District of California,

Appellee.

Reply Brief for Appellant

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Wareham C. Seaman
SEAMAN & DICK
Attorney for Appellant

FILED

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NO. 14494

In the
United States
Court of Appeals
for the Ninth Circuit

BARTOLOMEO MONGE,

Appellant,

vs.

JAMES G. SMYTH, Collector of Internal Revenue
for the First District of California,

Appellee.

Reply Brief for Appellant

Appeal from the United States District Court
for the Northern District of California,
Southern Division.

Wareham C. Seaman
SEAMAN & DICK
Attorney for Appellant



PRELIMINARY STATEMENT

Appellant filed his brief in this Petition for Review on the 24th day of February, 1955, and the brief for respondent-defendant was received by appellant's attorney on April 5th, 1955. This Reply Brief is therefore due to be filed on or before April 15th, 1955.

ARGUMENT

Appellant, before stating his reply to defendant's "Arguments", would like to invite the Court's attention to several statements by defendant preceding his "Argument".

In the "Opinion Below", it is suggested by defendant that the District Court's final order resulted from a remand from this Court. There was no remand—to the contrary, the appeal was dismissed without prejudice, the language directed more to the appellant than to the Court below.

Under "Jurisdiction", defendant again suggests a remand from this Court, but fails to note the action on the first amended complaint where defendant's motion for summary judgment was summarily denied (Tr-52), indicating a triable issue.

The "Question Presented" by the defendant is in fact only one of several, although in his "Argument" he does recognize that other grounds and issues exist.

In the "Statement" defendant suggests (Br-9, last par.) that this Court's dismissal of appellant's appeal was based upon its review of all the pleadings

prior to the lower court's dismissal of the action, thereby implying acquiescence of this Court in the dismissal of the original and first amended complaint (re: jeopardy assessment), which actually had not yet been dismissed (Tr-34). So far as appellant knows, this Court's review was only of the denial of the motion for rehearing.

Defendant's lengthy "Statement" clouds the fact that at one stage one of the lower courts recognized a cause of action (re: jeopardy assessment) and also recognized that appellant *might* have a further cause of action (re: validity of waiver) (Tr-top page 35). *This latter, and new ground, is contained in the last paragraph of Paragraph II of the second amended complaint (Tr-37), and was not part of the original or first amended complaints.*

Appellant respectfully submits that the lower courts and defendant were fully apprised of the three (3) issues before this Court: first, are the facts alleged sufficient to support "extraordinary circumstances" (not narrowed to overt acts by the defendant) justifying injunction; second, was there a jeopardy assessment, and, if so, is the defendant bound by the statute to issue a notice; third, is appellant entitled to be heard on the validity of the waiver, and, if so, is the waiver valid under the rule of this Court. The essence of our rules of Federal Procedure is simplification and abolition of pleading technicalities. There is no "surprise" about these issues, defendant acknowledges the issues in his argument, they were amply briefed in the lower courts,

and appellant respectfully submits that this Court is entitled to review the whole case de novo and determine the correctness of the lower courts' actions on all the errors cited for appeal without searching for technical flaws to bypass equity.

IN RE: INJUNCTION

Has "extraordinary circumstances" for equity to intercede been narrowed to overt acts of the government agents? Can anyone, let alone a public official, close his eyes to an injury to another, reap the benefits, and claim immunity under the very document under which a fraud was perpetrated and whose own validity is questionable, steadfastly refusing reconsideration where there would be no detriment to defendant to do so *unless defendant's position was untenable legally and equitably*. Is it necessary that the defendant be "arbitrary and oppressive" *before* the determination, excusing such acts *after* the determination in the light of the circumstances here alleged, where the defendant's sole duty is to collect the taxes legally due?

Defendant (Br-32) denies that appellant has no adequate remedy at law, suggesting a refund suit. The document he insists is valid binds plaintiff to file no such claim (Appendix B, page VI), and is final according to defendants brief, page 31. The irreparable damage to appellant arises from defendant's seizure, of which the inability to sue for a refund is only a facet. In one of the earlier hearings,

on the argument on order to show cause, October 29, 1953, defendant repeatedly refused to answer the Court's inquiry of whether the defendant would withhold further seizure and sale pending judicial determination of appellant's case (Reporter's Transcript, page 65, 66, 70, 71). This was not in the transcript of record because defendant has not heretofore raised the question in any brief, and plaintiff necessarily kept the costs of printing at a minimum so as to avoid filing in forma pauperis.

It is noted that defendant argues strongly for the exclusion from consideration by this Court of the facts alleged by appellant's affidavits, at the same time arguing the forcefulness of his Exhibits and pleading willingness to meet any "meritorious claim" (Br-32). By refusal to look at the facts:

Appellant respectfully submits that *evidence* of defendant's knowledge of injury to the appellant is appropriate to the hearing on the merits, and not to be pleaded after allegation. Obviously, as one of the Points on Appeal, appellant has not abandoned his plea for injunction as suggested by defendant (Br-25). Since there was no trial in the lower courts, this Court is free to draw its own inferences from the allegations and affidavits which stand uncontroverted on the pleadings in reference to the injunction.

In re: JEOPARDY ASSESSMENT

Defendant, in his brief, page 29, does not controvert the fact of a jeopardy assessment, but does

dismiss the legal issue by a truly "short and complete answer" that the waiver eliminates the necessity for a determination under Sec. 272(a) or for a jeopardy assessment under Sec. 273(a). Section 273(b) says, "*If the jeopardy assessment is made (a fact not denied by defendant in his brief, and at least at issue) before any notice in respect of the tax to which the jeopardy assessment relates has been mailed under Section 272(a) (defendant has stipulated that the notice was not sent) then the Commissioner shall mail such notice under such subsection within sixty (60) days after making the assessment.*", (emphasis supplied).

In his footnote 14, page 29, so placed to indicate a further expression of the case quoted, defendant assumes the interdependence of Section 272 and 273, whereas the only connection is the requirement in Sec. 273(b) that the letter be sent. The subsection doesn't even contain the word "determination".

Whether there would be the "need" (Br-footnote 14) for the jeopardy assessment after a waiver (assumed valid) might make a nice legal question, but here we are faced with an alleged *fait accompli*, and are not concerned with the necessity. Is the defendant more excusable from acts than is the plaintiff?

IN re: VALIDITY OF WAIVER

Can a statute (Sec. 272(d) providing for waivers) granting a unilateral "right" (admitted by defendant, Br-31, line 10) be enlarged by administrative fiat into a bilateral agreement, denying the taxpayer

the very privilege (of going to Tax Court) that Congress intended to preserve unto him? This Court has answered in the negative, but defendant still insists on the correctness of the First Circuit (Br-21, 27, 29). He further distinguishes by claiming that the instant case involves waivers 870 TS, whereas this Court considered mere waivers 870, although the statutory basis of both is the same. If the waiver 870 TS is to "form the basis for a final closing agreement" (Br-31) why not use the final closing agreement provided in Sec. 3760, IRC. He further distinguishes the cases in this Circuit on the facts. Does that alter the rule? Or, does the rule depend upon who seeks to invoke it, as did the defendant in one of the cases?

Defendant excepts to appellant's pointing to the acceptance in the 1954 Internal Revenue Code of this Court's rule (Br-31, last sentence). His italicized quote means the taxpayer can waive before or after notice the restrictions of subsection (a) *on assessment and collection*, but it does not waive the *notice required in another independent section*, Sec. 6212(a), 1954 IRC.

The First Circuit cases cited by defendant, however, support appellant's contention that the issue of validity of the waiver should be resolved before determining jurisdiction. Appellant submits that the validity was and is at issue, but has not been considered, or if considered, then the lower court's order was in error in dismissing the action.

CONCLUSION

Appellant resists narrowing this appeal to a question of injunction. He seeks an injunction on the allegations of arbitrary and oppressive conduct of defendant under the circumstances, after as well as before the waivers; further, on the ground that the defendant failed to comply with the statutory requirements in his act of making a jeopardy assessment; and finally on the ground that the waiver was invalid, bringing the defendant within violation of the statutory requirements of Sec. 272(a) that a notice be issued, otherwise injunction can lie.

(1) Appellant also contends that rescission on equity grounds is as an appropriate a remedy in this instance as is injunction and points out that there is no statutory bar to rescission of the disputed waiver.

Appellant respectfully submits that he is entitled to his day in Court on the facts, and that the legal issues should be resolved before he suffers irreparable loss without an adequate remedy at law.

Dated at Stockton this 14th day of April, 1955.

Respectfully submitted,

SEAMAN & DICK,

By Wareham Seaman

(Attorneys for Appellant.)



NO. 14494

In the
United States
Court of Appeals
for the Ninth Circuit

BARTOLOMEO MONGE,

Petitioner,

vs.

JAMES G. SMYTH, Collector of Internal Revenue
for the First District of California,

Respondent.

Petition for Rehearing

Wareham C. Seaman

SEAMAN & DICK

Attorney for Appellant

FEB 15 1950

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Attorney for Appellant

and filed March 11, 1953, (Tr.-33). This motion was denied September 29, 1953 (Tr.-34) but the Court did dismiss the first amended complaint (even though answered and ready to be set for trial) but with leave to amend because "the affidavit filed in opposition to the motion to dismiss suggests that it may be possible for plaintiff to so amend his complaint as to remedy this deficiency" (Tr.-34). The affidavit referred to raised the issue of the validity of the waiver later put in issue in paragraph II of the second amended complaint (Tr.-37) which the second lower Court said raised no new issues (Tr.-48).

4. Sixth sentence, second paragraph — "Therein (second amended complaint) appellant alleges that respondent, etc." The allegations set forth were in the original complaint (Tr.-3), the essential allegations being that of adverse representation known to respondent (Tr.-4, par. 3).

5. Eighth sentence, second paragraph—"Abraham Buchman . . . having adverse interest . . . known to representatives; execution of the waiver (for) income tax greatly in excess of the correct tax liability . . . resulting in a fraud." Nowhere in any of the complaints or affidavits is fraud on the plaintiff by anyone alleged or suggested as a conclusion although the allegations could clearly support such finding; nor does the word "fraud" appear except in reference to the penalty.

6. Twelfth sentence, second paragraph — "Respondent moved to dismiss the action on the

ground that . . . ” This motion, if in reference to the original complaint, was to dismiss the complaint and not the action (Tr.-20).

7. Second sentence, third paragraph — “Thereafter an order was entered granting the motion.” This motion was in reference to the original and first amended complaint and was *not* granted (Tr.-34). See No. 3 above.

8. Last sentence, third paragraph — “It was from this Order that this appeal is taken.” The Order appealed from is that of July 1, 1954 (Tr.-48), inasmuch as the Order referred to was not appealable as found by this Court in the prior action (Tr.-31).

9. Fifth paragraph — “The Court stated that no issues of law were presented other than theretofore ruled upon when it dismissed the first amended complaint.” It was this Order of July 1, 1954, dismissing the action, which gives jurisdiction for this appeal and is one of the errors specified in that a new issue was presented (Tr.-37, par, II, raising issue of validity of waivers).

10. Omitted from Footnote No. 1 in reference to the facts set forth in the affidavit was the following:

(a) “That plaintiff’s tax liability was based almost entirely on such transactions” (Tr.-10) with Atlas, a fact known to respondent.

(b) That “certain facts concerning these types of manipulations (double weight certifi-

cates and cash advances to Buchman) had become known" to respondent during investigation and conference (Tr.-11).

(c) That "the form 870-TS filed by plaintiff had been prepared in blank, no amount of deficiency being shown thereon" (Tr.-12).

11. Last sentence, paragraph seventeen — "If he does file a waiver he is benefited by thereby stopping the running of interest for thirty days after filing." The effect of a waiver is to stop the running of interest after thirty days from filing. Sec. 292(a), 1939 IRC, providing that interest shall be collected "in the case of a waiver under sec. 272(d) to the thirtieth day after the filing of such waiver or to the date that deficiency is assessed, whichever is the earlier." It might be pointed out that the only benefit received by Monge from the execution of the waiver was the interest from December 2, 1949 (thirty days after signing of the waiver on November 2, 1949) to to December 28, 1949, a matter of twenty-six days.

12. First sentence, last paragraph — "Although plaintiff's affidavit (Footnote No. 1) revealed that Monge received a notice of deficiency" . . . This is what plaintiff prays for, which respondent refuses to give under sec. 272(a), 1939 IRC, and such prayer is in conformity with prior rulings of this Circuit.

13. Last sentence, last paragraph — "More time than the ninety-day restrictions elapsed between these dates . . . " In the absence of a notice

of deficiency this statement is meaningless, confusing and has no application to the income tax laws or to the opinion of this Court.

GROUND FOR REHEARING

I

The opinion emphasized and relied upon a change in the 1954 Code not applicable to the years at issue.

Sec. 6213(d) cited and relied upon is found in the 1954 Internal Revenue Code and is effective only on and after August 17, 1954 (Sec. 7851(a) (6) (A)) and is not applicable under the 1939 IRC (Sec. 7851 (a) (6) (B)). The italicized portion cited and relied upon is not a part of the 1939 Code which is effective for the years at issue.

Furthermore, it is respectfully submitted that sec. 6213(d) cited in the opinion, refers only to subsection (a) of the same section and not to sec. 6212, 1954 IRC, headed "Notice of Deficiency" which says: "If the Secretary . . . *determines* there is a deficiency . . . he is authorized to *send notice* of such deficiency . . .," (emphasis supplied), thereby requiring two separate acts, (a) a determination, and (b) sending notice of such determination. Were both of these requirements to be waived, then sec. 6213(d) is ill-worded or ill-placed, although sec. 6213(a) does contain mention of the notice but not of the determination. This distinction, relied upon in this Circuit in prior decisions, is discussed more at length under Ground No. IV.

Appellant respectfully suggests that the court's decision does not distinguish the "determination" from the

“Notice of Deficiency,” the failure of either making the waiver invalid under the prior decisions of this court.

II

The findings of fact relied upon in the opinion were contrary to allegations, the only facts before the Court in the absence of a trial.

A. Adverse Interest With Knowledge by Respondent:

The opinion finds that Buchman would not be “breaching his obligations as an attorney or that the Government was thereby charged with knowledge that a fraud was being perpetrated” by Buchman serving two masters.

The complaints allege adverse representation with knowledge by respondent, and in the absence of trial should be accepted as true. Such facts have not been denied by the respondent in any pleadings or trial.

The Rules of Professional Conduct, approved by the California Supreme Court, and analogous to the Canons of Ethics of the American Bar Association, state in Rule 6:

“A member of the State Bar shall not accept professional employment without first disclosing his relation, if any, with the adverse party, and his interest, if any, in the subject matter of the employment.”

It is respectfully submitted that plaintiff was aware of Buchman’s relationship, but unaware that his relation or interest was adverse, as alleged in the original complaint (Tr.-4) and affidavit (Tr.-11).

Rule 7 states:

“A member of the State Bar shall not represent conflicting interests, except with the consent of all parties concerned.”

Plaintiff has alleged that Buchman had such adverse interest, known to respondent but not to him (Tr.-4), therefore plaintiff could not consent.

That the respondent knew of and benefitted from this breach is alleged (Tr.-4, par. 3). He takes sanctuary (in his brief but not pleadings) as not being responsible for plaintiff's representation and that the knowledge by the respondent was not “definitely” shown (Br.-25), which would and should be a matter of proof on trial. And, while technically or legally not “responsible”, knowledge goes a long way toward a species of fraud. *1 Story, Eq. Jud.*, 258, in reference to acts contrary to good conscience operating to the injury of another.

Assuming the facts as alleged it is inconceivable that this Court would sanction such gross abuse of administrative duty to see that tax liability was fairly and properly imposed, not as to amount but in procedure.

B. Irreparable Injury.

The Court finds there would be no irreparable injury should respondent not be enjoined, pointing out that redress could follow from a refund. Such could not be inferred from the allegations, nor was it so held by the decisions in *Midwest Haulers, Inc., v. Brady* 128 F 2d 496 and *John M. Hirst & Co. v. Gentsch*, 133 F 2d 247, cited with approval in the decision. Whether there

was irreparable injury within the rule of these cases is a question of fact to be proved in trial in support of the allegations.

C. General

It will be recalled that at the oral hearing the Court indicated that it was interested in certain facts in support of the allegations and in answer to questions raised by opposing counsel. Specifically, the Court asked why the reduction of Monge's liability by some \$20,000.00 was made in conference, as suggested by opposing counsel and in his brief (Footnote page 25). Counsel, with almost fiendish delight would have liked to answer this question, relying upon an affidavit of an officer of the respondent as one of the best items of proof of the gist of appellant's allegation of adverse interest with knowledge by the respondent. Counsel was precluded from answering because such facts were not in the record. He pointed out that there had been no trial to adduce the facts; that there were no stipulations to rely upon; that such facts were alleged and in the affidavits and were uncontroverted; and that it would be impossible within the limitation of this Court on length of briefs to fully set forth all the facts.

This emphasizes the necessity for a full hearing or trial on all the facts, and demonstrates the possible injustice of a decision without the knowledge of all the facts.

In effect, this case has been tried without a trial with this Court making some initial findings of fact, some contrary to uncontroverted allegations, and deciding issues of law not considered or tried in the lower Court.

III

As the basis for its decision the Court imputes to appellant issues not raised by him.

A. Fraud

Appellant has not alleged fraud. Had he done so “clearly”, then the form 870-TS would have been invalid *ab initio* or it could have been reopened by its express terms.

Plaintiff does allege such adverse interest with knowledge by respondent as to be unconscionable, justifying the intervention of equity on the ground of unusual and extraordinary circumstances to avoid the bar of sec. 3653(a), 1939 IRC. The decision indicates that fraud must be present, and appellant respectfully submits that this is contrary to all the decisions unless coercion, arbitrary acts and duress are such as to constitute fraud.

The appellant respectfully invites the Court’s attention to its citing with approval in the case of *Yoshimura v. Alsup*, CA 9, 167 F 2d 104, the case of *Miller v. Nut Margarine Co.*, 284 U. S. 498 that

“it requires no elaboration of the facts found to show that the enforcement of the Act against respondent would be *arbitrary and oppressive*, would destroy its business, ruin it financially and inflict loss for which it would have no remedy at law. It is clear that by reason of the special and *extraordinary facts and circumstances*, Sec. 3224 (now 3653(a)) does not apply. The lower Court rightly held respondent entitled to the injunction.”

In the *Yoshimura* decision, *supra*, the Court further said: "We can see no difference in a coercion by statute and such coercion by the statutory officers for the enforcement of the tax laws."

citing the case of *Matcovich v. Nickell*, 134 F 2d 837 as showing such coercion being sufficient as "the unusual and extraordinary case"; the case of *Concentrate Mfg. vs. Higgins*, 90 F 2d 439, on the ground of "gross and indisputable oppression"; and the case of *Burke v. Mingori*, 128 F 2d 996 on the "arbitrary and capricious conduct" of the Government.

Here plaintiff alleges such adverse interest with knowledge by the respondent, with detriment to the plaintiff but none to the respondent, with resulting benefits to the respondent from taxes not due and which the respondent should know are not due under the Internal Revenue Code, that make the whole unconscionable, easily justifying the Court's impression that it almost amounted to an allegation of fraud.

B. Hardship

Appellant did not seek the injunction on the ground of hardship although failure to enjoin would clearly result in such. He does not seek sympathy and knows such is not a ground for injunction. The facts alleged were for the purpose of supporting the necessary allegation of irreparable injury as a prerequisite to injunction on the ground of adverse interest with knowledge by the respondent.

C. Illegality of Taxes

Appellant does not allege that the tax laws are illegal and did not seek the injunction on that basis. He does allege, but does not rely on for the injunction, that he is not guilty of fraud, is being taxed for the liability of his putative wife, Mary Salamone, and for money properly taxable to Atlas.

D. Overbearing Conduct in Collection

Appellant does not criticize the methods or determination of the respondent to collect. That is proceeding according to law. He does object to the arbitrary and capricious refusal of respondent to review the tax liability of plaintiff or to allow any Court to review it, taking sanctuary in an agreement made under the unconscionable facts alleged, and which appellant contends is invalid.

IV

The Court's opinion is contrary to that of earlier decisions in this Circuit.

The only reference in the opinion of these earlier decisions is in Footnote 12, *Mutual Lumber Co., v. Poe*, CA-9, 66 F 2d 904, distinguishing on the ground that that there the waiver was unilateral, on form 870. If so, it also was a "Waiver of Right to File a Petition with the United States Board of Tax Appeals," a provision not in either the form 870 or 870-TS used during the years at issue, nor in the form 870-TS at issue, although much more binding and explicit in denying right to take to Court. Moreover, it was not unilateral

as a form 870 under sec. 272(d), 1939 IRC, because the Commissioner ignored it and issued a notice of deficiency, as he asserts he would have the right to do according to the terms of the form 870-TS at issue, but not according to a waiver under sec. 272(d), 1939 IRC, indicating that in fact and law the waiver was bilateral, regardless of label.

In that decision the Court cites the equivalent to sec. 272(a), 1939 IRC,

“If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, etc.”,

then says,

“This condition set out at the very beginning of the section assuredly qualifies all the other provisions contained in such section.”

further,

“If there is *no* determination by the Commissioner, there is no right of appeal for the taxpayer to waive; . . . For this reason we hold that the purported waiver was filed with the Commissioner before the latter had found any deficiency, was therefore premature, and was powerless to prevent the Commissioner’s resort to a letter of deficiency, by which the running of the statute was suspended.”

Taxpayer alleged, and respondent has not denied, that the form 870-TS in issue “had been prepared in blank, no amount of deficiency being shown thereon” (Tr.-12). It is respectfully pointed out to the Court that the form 870-TS set forth as Footnote 2 and as an exhibit of the respondent has at the bottom “This copy to be retained by Petitioner”, proof that it was never delivered to Monge, raising the issue of whether

there had ever been execution of the waiver by the respondent, making it bilateral, within the terms of the case of *McCarthy Co. v. Commissioner*, CA-9, 80 F 6d 618, citing the California Code of Civil Practice that "execution" includes "delivery."

In both the *Mutual Lumber* and *McCarthy* cases, supra, respondent treated the waivers as unexecuted bilateral waivers and issued the notices of deficiency. In both cases this was noted by the Court, but the decisions went further as shown by the above excerpts, namely, that the waivers were invalid because premature in the absence of determination. Certiorari was denied in both cases.

The *McCarthy* case, supra, went even further, saying,

"It has already been decided by this Court that a waiver (to file a petition to the Board) or consent (for assessment) of that kind filed before the Commissioner has sent a notice of deficiency (under 272(a), 1939 IRC) is premature and therefore invalid." (Parentheses supplied) citing the *Mutual Lumber Co.*, supra, and quoting from the case as set out above.

East Bay Water Co. v. McLaughlin, Dist. Ct. No. Calif., 24 F. Supp. 222, CA-9 *dism'g* 104 F 2d 1016, states

"The Government contends that *any* waiver filed *prior* to the *determination* of an assessment is premature and *invalid* . . ." (emphasis supplied)

This is the same position of the respondent and the Court in the *Mutual Lumber* and *McCarthy* cases, supra, and pleaded by the plaintiff as the rule in the instant case. For this Court to sanction the respondent's

change of mind with no intervening statutory support, requires reversal of the above cases.

The *East Bay* case, *supra*, cited the *Mutual Lumber* case, *supra*, by saying,

“It was there insisted that it had been the practice of the Commissioner to allow waivers prior to assessment of deficiencies, and that the Court should give heed to this practice in its determination. In reply to this the Court said: (P 907)

‘Granting that such was the custom and that the practice of an executive department charged with administering a statute has great weight with the Courts, such practice is not binding upon a judicial tribunal in the face of the plain terms of the statute.’ ”

It will be noted that the rule applies to all waivers under sec. 272(d), 1939 IRC, with no exceptions and without distinguishing between unilateral and bilateral.

The Court then quotes from a report of a subcommittee of the House Ways and Means Committee taking cognizance of the above rules of the *Mutual Lumber* and *McCarthy* cases, *supra*, which does not differentiate species or varieties of waivers under sec. 272(d), 1939 IRC, as did the Court in this decision; and the Court noted that Congress had not seen fit to change the rule, nor had it done so before the years at issue.

The decision in the instant case would ignore the above rule by insisting that the form 870-TS, while a child of sec. 272(a), the subject of the above cases, is beyond its rules because it is bilateral, even though the above cases dealt with waivers treated by the respondent as bilateral, and accepted by the Courts as bilateral.

V

The form 870-TS has no statutory basis in the Internal Revenue Code.

That form 870 is unilateral is conceded by the Court and the respondent (Br.-31). That sec. 272(d), 1939 IRC, was also intended by Congress to be unilateral is clearly indicated by the legislative history of that section, most clearly shown by the committee reports on the initial enactment, with no intervening statutory change. The Senate Finance Committee Report, 69th Cong., First Sess., S. Rept. 52, adopted and followed by the Conference Report, after discussing the impact of interest rates resulting from administrative delays in assessment, stated,

“In order to permit the taxpayer to pay the taxes and stop the interest, the Committee recommends in sec. 274(d) of the bill (now 272(d), 1939 IRC) that the taxpayer at any time be permitted to waive in writing the restrictions on the Commissioner against assessing and collecting the tax *but without taking away the right of the taxpayer to take the case to the Board*, (now the Tax Court)”. (Emphasis supplied)

Neither in the statutory language nor in the above committee report is there a requirement that the waiver be accepted, be bilateral, or that the taxpayer waive a multitude of other rights as a *sine qua non*. Reserving the right “to take the case to the Board” is a reservation intended by Congress that would be a nullity unless the notice under sec. 272(a), 1939 IRC, were issued, and clearly supports the prior rule in this Circuit that a determination *and* notice of deficiency under sec. 272(a), 1939, IRC are required even

with a waiver, as jurisdictional to "taking the case to the Board".

There is nothing in sec. 272(d) authorizing the Commissioner to make the agreement on his part as recited in the 870-TS. Such authorization is expressly found in sec. 3760, 1939 IRC, for a closing agreement under that section, as follows:

- (a) Authorization — *"The Commissioner . . . is authorized to enter into an agreement in writing with any person relating to the liability of such person . . .*
- (b) Finality — *If such agreement is approved by the Secretary . . . such agreement shall be final and conclusive, and, except upon a showing of fraud or malfeasance, or misrepresentation of a material fact—*
 - (1) The case shall not be reopened . . .
(emphasis supplied).

The emphasized portions bear striking similarity to the essential parts of the form 870-TS, particularly those parts relied upon by the Court in this decision. By making the 870-TS subject to the approval of the Commissioner and requiring the taxpayer to agree to the formality of executing a closing agreement under sec. 3760, 1939 IRC, the form 870-TS has all the attributes of such closing agreement. In fact, the form 870-TS is even more binding.

It is respectfully submitted that the most liberal construction of sec 272(d) does not authorize the finality of form 870-TS, that such authority is reserved to sec. 3760, 1939 IRC, and that the Commissioner by using such form is using a waiver, intended

to be unilateral and a relief to the taxpayer, as a substitute for the agreement provided in sec. 3760, 1939 IRC. In form 870-TS, the Commissioner is assuming power reserved to and the subject of an express power of approval in a higher officer.

VI

The decision is in conflict with the First and Third Circuits ^{and} its own prior decisions.

In *Associated Mutuals v. Delaney*, 176 F 2d 179 and *Victory v. Manning*, 128 F 2d 415, cited with approval in the decision, as well as the *McCarthy* and *Mutual Lumber Co.* cases, supra, it is held that the issue of validity of the waivers should be determined before the issue of jurisdiction. Here, the trial court refused to consider the issue of validity, dismissing without a trial on the merits, and this Court affirms such dismissal contrary to the uncontroverted allegations of invalidity.

VII

The decision is contradictory and ambiguous in its ruling on appellant's right to file claim for refund.

Paragraph 3, page 8, of the decision says:

“The statement of appellant that he has no adequate remedy at law is met by the statement that he may bring an action to recover taxes illegally assessed and paid by him.”

Paragraph 3, page 9, says:

“The refunding provision provides the taxpayer may recover all he pays if he does not owe the taxes. Since any wrong he suffers may be remedied by a money consideration, a denial of an injunction does not work irreparable injury.”

Last paragraph, page eleven, says:

“Thus we have a bilateral agreement which includes the waiver which when accepted on behalf of the Commissioner ‘shall not be reopened nor shall any claim for refund be filed respecting the taxes . . . ’ The acceptance by the Commissioner effected a final determination of deficiency and rendered unnecessary a formal deficiency determination.”

Should there be no right to file claim for refund, irreparable injury is unquestionable.

If the right survives, then irreparable injury depends on uniqueness as found in *Midwest Haulers* and *John M. Hirst* cases, *supra*, cited with approval in the decision. That such uniqueness exists here is alleged (Tr.-13) and is discussed more fully under Ground No. II. Money is no substitute for one's home of thirty-five years, a vineyard constituting one's sole livelihood, complete destitution and loss of needed medical treatment, particularly when that money, on forced sale, will be less than true market value.

VIII

The decision is in error in holding that the waiver eliminates notice of jeopardy assessment.

The decision states that the waiver removes the restriction on assessment. It would do violence to the Congressional intent, the plain statutory language, and the previous decisions of this Court and other Courts, cited with approval in this decision, to hold that the waivers may be executed after assessment and be effective to stop the running of interest.

Sec. 273(d) relating to jeopardy assessments, says:

“If the jeopardy assessment is made before any

notice in respect of the tax to which the jeopardy assessment relates has been mailed under sec. 272(a), then the Commissioner shall mail a notice under such subsection within sixty days after the making of the assessment."

If the notice has already been mailed we have no problem because the taxpayer still has the right of appeal to the Tax Court. Waiver at that time would be proper under the clearly expressed intent of Congress and the prior decisions in this Circuit. If the jeopardy assessment is made before the notice is sent, then the waiver would be inapplicable because of the *fait accompli* in issuing the assessment. It is respectfully suggested that the Commissioner would be the last person to accept or honor a waiver after an assessment is made thereby stopping the running of interest. Therefore, a waiver would be valid only if a notice is sent before assessment (not done in the instant case) and a nullity if signed after assessment (not done in the instant case).

Whether a jeopardy assessment was made is a question of fact. It was alleged (Tr-21 and 40), summary judgment for respondent was denied (Tr.-31), and answered by respondent (Tr.-29). The decision does not attempt to find whether a jeopardy assessment was actually made.

CONCLUSION

Appellant appreciates that this Court is torn between its sympathy for Monge and its duty to protect the Federal revenues. His entire effort has been to have a hearing on the facts in the belief that the shock to the conscience of the Court will outweigh its regard for protection of the revenues, particularly since the respondent would not be injured by such hearing should appellant be in error. It is noted that the decision omits any reference to the allegations and affidavit supporting the exhaustion of administrative remedy. In this connection the comments of the lower Court (Tr.-53) indicate the basic controversy in this matter. All that the plaintiff asks is that his tax liability be determined in negotiation or trial represented by counsel not adverse to his interest, and not bound by a document secured under the circumstances alleged and of doubtful validity in execution and under the law. The position of respondent clearly indicates his intention to use the waiver, no matter how secured and with complete indifference to the correct tax liability, to force collection. Appellant asserts that there is no thought in his mind of escaping his true tax liability, regardless of consequences, nor is he resorting to litigation for delay because at his age delay can have serious consequences. Nor is he attempting to "get a second bite at the apple" for the simple reason that he has never had that first

bite of a fair and impartial determination of his correct tax liability.

Respectfully submitted,

WAREHAM C. SEAMAN,

Attorney for Petitioner.

I hereby certify that in my judgment the Petition for Rehearing is well founded, and that it is not interposed for delay.

WAREHAM C. SEAMAN,

Attorney for Petitioner.







